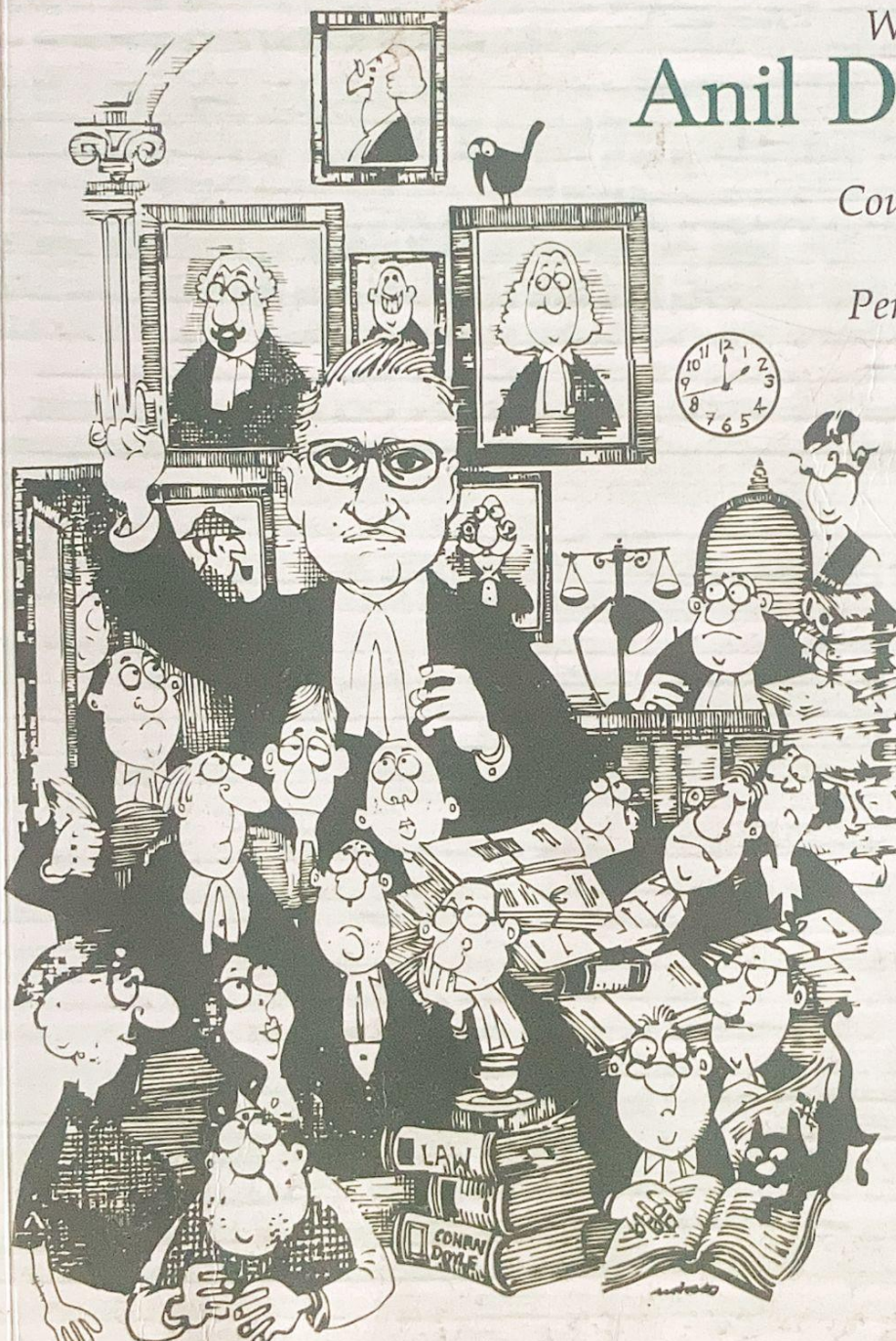


On the FRONT FOOT

Writings of
Anil Divan
on
Courts, Press
and
Personalities

Second
Edition



Universal
Law Publishing

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First Edition	2012
Second Edition	2016

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By
ANIL DIVAN
Senior Advocate, Supreme Court of India

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This book is a publication of LexisNexis
(A Division of RELX India Pvt Ltd)
14th floor, Building No 10, Tower-B, DLF Cyber City, Phase-II,
Gurgaon-122002, Haryana, India.
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Anil Divan: *On the Front Foot*, Second Edition 2016

ISBN: 978-93-5035-816-0

Printed by: Sita Fine Arts

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ACKNOWLEDGMENTS TO THE SECOND EDITION

I must acknowledge the great contribution of my friend and colleague Ranvir Singh who not only fine-tuned the articles but whose efforts and enthusiasm in collaboration with the extremely supportive editorial and design team of my publishers LexisNexis India comprising Roohi Kohli, Syed Hasan Imam and Mamchand Choudhary, has made this second edition possible in record time.

PREFACE TO THE SECOND EDITION

Three significant events have occurred after the first edition released by Justice J.S. Verma on 8th December, 2012. First, Justice Verma passed away on April 22, 2013. Second, Universal Law Publishing Co.- my publishers, assigned the rights to LexisNexis. Third, the Lok Sabha election of May 2014 elected the National Democratic Alliance (NDA) dethroning the United Progressive Alliance (UPA).

The tension between the Executive and the Judiciary continues unabated. My first article in the print media (Sunday Standard Magazine: 28th June, 1981) – The Government *vs.* the Supreme Court - reflects that tension. H.R. Bhardwaj, former Minister for Law and Justice (2004 to 2009) encapsulates it thus - Asked if it was his opinion that through measures like the National Judicial Appointments Commission (NJAC) politicians try to control the judiciary, Bhardwaj said “Is there any doubt about it? .. They have always been making attempts”. (Indian Express: 28th October, 2015)

Two articles – “A Trojan Horse at the Judiciary’s Door” and “Upholding Judicial Independence” relate to this tension and analyse the provisions of the Constitutional Amendment and the Judicial Appointments Commission Bill (JAC Bill) sponsored in the Rajya Sabha by the former UPA Government. The Amendment was passed in the Rajya Sabha in September 2013, after BJP Opposition conveniently walking out, but was never moved in the Lok Sabha.

These articles point out the pernicious shortcomings of the UPA Bills and observe that “to attempt to restore the predominant voice of the political class in judicial appointments and transfers will amount to subverting the basic structure of the Constitution” – “A poisoned chalice”, an “ill-concealed wolf in sheep’s clothing”.

The NDA after assuming power followed the same pattern and with the full support of the Congress (I) and other political parties passed the 99th Constitutional Amendment and the National Judicial Appointments Commission (NJAC) Act. The Supreme Court Advocates-on-Record Association (SCAORA) led by Fali Nariman and the Bar Association of India led by the Author mounted a challenge to the 99th Amendment and NJAC Act. They were both invalidated as unconstitutional by the Supreme Court on 16th October 2015.

The third article – “Making the Judiciary more Transparent” argues for a transparent judicial appointments procedure and reform of the Collegium system emphasising the principles of ‘open justice’ and the citizens ‘right to know’.

Three biographical sketches include Justice J.S. Verma, Justice V.R. Krishna Iyer, and Shanti Bhushan. I have described Justice Verma as “a judicial warrior

with a lion heart” and “that he was innovative, intelligent, indefatigable but above all he was the embodiment of integrity”. Justice Krishna Iyer – a revolutionary at heart – principally triggered an internal revolution in the thought process of his colleagues in the Supreme Court. Shanti Bhushan – who is still with us – during the Janata Government as Law Minister undid the damage to fundamental rights and judicial review by successfully piloting the 43rd and 44th Constitutional Amendments.

The article on CBI advocates an independent constitutional status for the CBI if it is to be free from political interference. The article on death penalty raises the question whether a death penalty executed against a terrorist is counterproductive. “Criminal defamation” abolished by many countries requires India to follow in their footsteps. “Gay rights are human rights” is critical of the Supreme Court judgment which reversed an internationally acclaimed judgment of the Delhi High Court decriminalising Section 377 IPC in case of adult consensual sex in private. The Convocation address builds upon anecdotal events containing lessons for the young lawyer. Foreign access to the Bar, it is argued, requires a strict court monitored structure.

ANIL DIVAN

ACKNOWLEDGMENTS TO THE FIRST EDITION

To Justice J.S. Verma who was kind enough to quickly respond with an introduction and whose path-breaking judgments have triggered many of the topics tackled in this collection; to Ms. Sudha Mahalingam who gave initial impetus by discussing the structure of the book; to Dr. Archana Negi for important inputs and proof-reading; to my staff, Thomas Korah (now retired), Jitendra Kumar and Om Prakash Sharma who kept meticulous records of my articles, speeches and papers and who could produce copies at lightning speed; to my junior Rishi Kumar Singh Gautam for invaluable assistance in proofreading; to Gauri my daughter, for polishing and fine-tuning the write-up “About the Author”; to Vivek and Shyam my sons and my daughter-in-law Madhavi for suggestions on my author’s note heading each chapter; to Smita, for her patience while I spent endless hours to select and proof-read this collection; to Pradeep Arora and Manish Arora, the Publishers, Universal Law Publishing Co. Pvt. Ltd. and Syed Hasan Imam, Editor and his team; most of all, to my friend and colleague Ranvir Singh, but for whose boundless support, enthusiasm, devotion, dedication and industry this book would not have seen the light of the day.

ABOUT THE AUTHOR

ANIL DIVAN, Senior Advocate

Anil Divan was born on 15 May 1930 to Sharda and Baburao Divan. His family lineage includes his maternal grandfather, Sir Chimanlal Setalvad a leading lawyer at the Bombay Bar and his paternal grandfather Jivanlal Divan the founder of the famous Proprietary High School in Ahmedabad who also participated in the Dandi Salt march. His mother, Sharda was the first woman Registrar and later Vice-Chancellor of the SNDT Women's University in Mumbai while his father Baburao was as an alumnus of Columbia University (New York) and earned a degree in Pedagogy with a view to contributing to the Proprietary High School. When Baburao's father, Jivanlal, inspired by Gandhiji's independence movement converted the School into a public trust he could not pursue a teaching career and became an entrepreneur. Anil Divan's maternal uncle Motilal Setalvad was the first Attorney General and his paternal uncle Bipinchandra J. Divan was Chief Justice of Gujarat High Court.

Anil Divan started his practice on the Original Side in the Bombay High Court in 1951 and was designated as Senior Advocate in 1972 by the Bombay High Court. In 1979 he shifted his practice to the Supreme Court in New Delhi.

Anil Divan has argued many *pro-bono* public interest litigation cases in the Supreme Court, including the *Pensioners'* case (*D.S. Nakara v. Union of India*, 1983) for Common Cause. He was appointed *Amicus Curiae* by the Supreme Court in the public interest litigation involving high level political and bureaucratic corruption in the *Jain Hawala* case (*Vineet Narain v. Union of India*, 1998); the *Chandraswami* case (*Anukul Chandra Pradhan v. Union of India*); and the *Indian Bank Scam* case (*Dr. Subramanian Swamy v. Director CBI*). He has also appeared in the *Shriram Fertilizer* case and the *Bhopal gas leak* case for the respective corporations. He is currently appearing in the *Black Money* case filed by Ram Jethmalani and others, which is pending in the Supreme Court.

Anil Divan was elected as President of LAWASIA (1991-93) and is a member of the International Law Association (ILA) and has served on its Water Resources Committee as well as Bio-technology Committee. He is currently the President of the Bar Association of India.

Anil Divan has been conferred Doctor of Law *honoris causa* by Ravenshaw University, Orissa (2009); and the "*Naitik Samman*" presented by the President of India Dr A.P.J. Abdul Kalam on behalf of the Gulzari Lal Nanda Foundation (2004).

Anil Divan's wife Smita Divan is a former President of the Maharashtra State Women's Council, Mumbai and has served as the Vice-President of the Gujarat Education Society, New Delhi. His elder son Shyam Divan, Senior Advocate and daughter-in-law Madhavi Divan, Advocate, practice in the Supreme Court. His daughter Dr. Gauri Divan and son-in-law Professor Vikram Patel work in a non-governmental organization which promotes child development, adolescent health and mental health. His youngest son Vivek Divan is a lawyer who has worked in the areas of HIV, health and sexuality rights in the non-profit sector and is currently a Policy Specialist with UNDP in New York. Anil Divan's grandchildren are a charming threesome: Farai, Avanti and Devaki.

PREFACE TO THE FIRST EDITION

Life in the law as a litigator for over 60 years has been thrilling. My association with law started in June 1949, when I joined the LL.B. class in the Government Law College, Bombay. Our faculty included Nani Palkhivala and Yeshwant Chandrachud. On my enrolment in November 1951 as an Advocate in the Bombay High Court, my association with law gathered strength. The Constitution of India came into full force on 26th January 1950. I had the privilege of observing the development of constitutional jurisprudence and the functioning of the Supreme Court and High Courts for over 60 years, which roughly corresponds to the length of my professional career. My valued friend A.G. Noorani (Gafoor) encouraged me to write on issues concerning public law and one of my early efforts was included in a book edited by him and titled *Public Law in India*.

These 60 years have been eventful in both turbulent and fascinating ways. Our democratic experiment in elections and governance has developed many practices and malpractices. The three departments of State – the Legislature, the Executive and the Judiciary – have strived to maintain freedom through law (except in the years of internal emergency from June 1975 to March 1977). But the common man's perception of the Legislature and the Executive in terms of integrity, honesty and stature has suffered a sharp decline. The higher Judiciary, in contrast, has presented itself as an exception, gaining tremendously in reputation, both nationally and internationally. It has come to be perceived as independent and as a check on arbitrary power and as an effective antidote to many public grievances. This remarkable achievement is in no small measure due to the active and unstinted support of the Bar throughout India – and in this I include many retired members of the Judiciary itself. This is not to say that there have been no black sheep in the Judiciary.

This collection is a chronicle of my evolving thoughts and perceptions, collective memories of the Bar and events in the theatre of the courts gleaned over many years. My views on the shortcomings of the Judiciary have been expressed forthrightly, even though not palatable to many. The criticism is to help strengthen, invigorate and reform the Judiciary. In the words of Gautam, the Buddha, "Doubt everything. Find your own light and seek the truth".

I have played my innings on the front foot.

Delving into the past and observing the present, what has thrilled me is the 'courage' displayed by judges and lawyers through the centuries in standing up to the powers that be. Virtues like honesty, integrity, hard work and professional merit can take a judge or a lawyer to the top of his calling. But during testing

times or in a crisis, the courage to stand up and be counted catapults a judge and a lawyer to greatness and undying fame. He becomes an inspiration for future generations. It is this spirit of courage which I have sought to illuminate.

Instances of the display of courage are legion - Chief Justice Coke standing up to the James I on November 16, 1608; Sir Peter Grant closing the doors of the then Supreme Court in Bombay on 1st April, 1829, (by which Chimanlal Setalvad was inspired to join the Bar as mentioned in his "Reflections and Recollections"); the powerful dissent of Lord Atkin in *Liversidge v. Anderson* during the Second World War where he called some of his colleagues "more executive minded than the executive"; Motilal Setalvad (then serving Attorney General) criticizing the conduct of the Finance Minister T.T. Krishnamachari in the Mundhra Inquiry Commission while acting as counsel for the Commission; the no-nonsense approach of the sitting Chief Justice M.C. Chagla of the Bombay High Court, acting as Commissioner in the Mundhra Inquiry and indicting Finance Minister T.T. Krishnamachari and other high officials in the government, notwithstanding Prime Minister Nehru's public speech praising the Finance Minister; the judgment of the Bombay High Court (Chief Justice Kantawala and Tulzapurkar J.) striking down (during the Emergency) the Police Commissioner's order which banned a private meeting of lawyers where Justice J.C. Shah (former Chief Justice of India), M.C. Chagla, (former Chief Justice of Bombay) and N.P. Nathwani, (former Judge of the Bombay High Court) were to address lawyers; H.M. Seervai, (serving Advocate General Bombay) during the formative years of the Bombay City Civil Court, taking on the sitting Chief Justice Chainani and the government for superseding three seniormost judges [B.J. Divan (later Chief Justice Gujarat), V.D. Tulzapurkar (later Judge Supreme Court) and J.R. Vimadalal (later Judge Bombay High Court)] while appointing the Principal Judge and getting the decision overturned; Nani Palkhivala's immediate resignation as Indira Gandhi's counsel in her election case in the Supreme Court, on the declaration of the Internal Emergency and the arrest of many Opposition leaders; Justice Krishna Iyer's order giving only a limited stay to Indira Gandhi in her election appeal inspite of a cacophony of inspired propaganda; the unprecedented order of the Supreme Court (J.S. Verma J., S.P. Bharucha J. and S.C. Sen J.) on 1st March, 1996 in the Jain Hawala Case (*Vineet Narain v. UOI*) directing the CBI not to take instructions from or report to any authority likely to be affected even though exercising administrative control over the CBI by virtue of the office he holds without any exception (in substance, Prime Minister Narsimha Rao); the heroic dissent of Justice H.R. Khanna in the *Habeas Corpus* case during the Emergency which cost him his Chief Justiceship.

Recently I read a report that a copy of the complete works of Shakespeare found its way in the notorious Robben Island jail in South Africa where Nelson Mandela spent 18 years of his 27 years in prison. Sonny Venkatrathnam, a fellow prisoner, smuggled the book and pasted the cover with Hindu deities from Diwali greetings cards, thus disguising the book from prison guards. The book (called the Robben Island Bible displayed in the British museum as part of

London 2012 Festival) was circulated amongst the prisoners and Venkatrathnam asked each one to mark out their favourite passage. Nelson Mandela marked out Caesar's speech to his wife Calpurnia before he goes on the Ides of March to the Senate where he was assassinated. Caesar says "Cowards die many times before their deaths. The valiant never taste of death but once".

Each generation reaches its finest hour by inspiring the next, by sharing its priceless experiences and courageous battles, in the never ending struggle in support of the independence of the Judiciary to uphold the Rule of Law founded on Human Rights.

ANIL DIVAN

INTRODUCTION TO THE FIRST EDITION

This book is not a miscellany of random thoughts of an eminent lawyer recorded during his distinguished career covering the several momentous events involving the Indian judiciary in the working of a democratic Constitution, but a structured compilation of an insider's view on significant issues and their vicissitudes impinging on the rule of law. The author's contribution to the development of public law, particularly in the field of probity in public life as *amicus curiae* in the Supreme Court of India amply qualifies him to speak authoritatively on the many topics covered in the book.

I am not aware of any other more erudite work by an individual in the legal profession contributing so precisely a better comprehensive overview of the judicial insight into the values enshrined in the Indian Constitution. In the format of quasi-memoirs, the book transcends to the level of a text book on the global impact and comparative study of the meaning of the rule of law in liberal democracies, focusing on the Indian experience.

Another significance of the book is that it is a compilation of the views mostly contemporaneous to the related events for greater impact, and not those in retrospect only with historical perspective. In Chapter 38, writing about Justice H.R. Khanna, the author says *"In a democracy, it is essential to share with each new generation the experiences of the past great sacrifices made for the cause of the independence of the judiciary, the Rule of Law and human rights"*. This book serves that purpose.

The emphasis on the ethical component in the rule of law throughout the book is manifest in the author's admiration for H.M. Seervai, when he says *"He was an icon worth emulating if one could stay the course and was not bewitched by prizes which politicians could offer. In that sense I consider myself a beneficiary of the Seervai Legacy"*. In a letter to Seervai's wife Feroza, he wrote:

"In my formative years at the Bar, Motilal Setalvad as Attorney General and Homi Seervai as Advocate General were two shining examples of independent fearless advocates who had reached the top of the profession without indulging in unethical practices and without fawning on politicians and developing rapport with powers that be. Unfortunately, it is a different world now".

This sentiment makes the book invaluable for the young lawyers to allay their misapprehension that success in the legal profession cannot be achieved by strictly ethical means. It also enables a better appreciation of the meaning of the rule of law, wherein 'law' is seen as '*institutionalized morality*' in the words of Prof. Jeffrey Jowell.

The contents of the book are essentially a description of the journey of the Supreme Court of India towards its envisaged role of the *sentinel on the qui vive*, the rigours of which were mitigated by the dedicated contribution of committed eminent lawyers and visionary judges for whom professionalism was paramount, uninfluenced by any mercenary or other consideration for personal gain. This has contributed to global recognition of the Supreme Court's role in the international impact of constitutionalism, except during the infamous Emergency (1975-'77).

Some notable developments in the constitutional law with their background are described with an insider's perspective. The brilliance of Nani Palkhivala in getting recognition for the innovative indestructible basic structure doctrine in the Kesavananda Bharati case based on the ground of inherent or implied limitations of the constituent power advocated by the German Professor Conrad, of which the seed was sown in the Golaknath case; and M.C. Chagla's insistence that Palkhivala and not he was the best person to advance the leading argument, are facts stranger than fiction for the present generation. Several other educative events in the development of constitutional law in India are chronicled.

The Court read '*due process*' in the constitutional rights despite its express exclusion in the framing of the constitution; freedom of the press has been implied in the people's freedom of speech etc. in Article 19(1)(a); the non-justiciable directive principles were read into the justiciable fundamental rights; the element of 'fairness' as an attribute of the rule of law was recognized as essential in all decisions affecting civil rights, thereby obliterating the distinction between administrative and judicial functions; liberalizing the *locus standi* rule to develop the judicial process of Public Interest Litigation enabled realization of the constitutional rights of the '*have-nots*', enforcement of probity in public life, and protection of environment, ecology and wildlife; strict liability in tort resulting from hazardous activity while balancing the needs of sustainable development; and constitutional tort as a more efficacious public law remedy in addition to the private law remedy in tort have been developed with global recognition and impact. The route traversed by the Court to achieve these results has been described vividly. The author as *amicus curiae* in many of these cases gives an insider's view of these developments in the jurisprudence.

Emphasis is laid on maintaining judicial independence with accountability for the judiciary's credibility and efficacy in preserving the rule of law. Importance of the process of appointment of the judges in the higher judiciary is, therefore, paramount to ensure objectivity eschewing all demeaning considerations in the selection. The three Judge's cases are dealt with, which swung the pendulum first to executive supremacy and then to supremacy of the judicial collegium—working of both seen as unsatisfactory. The author compares the systems adopted for such appointments in other similar democracies and pleads for change in India for greater objectivity in the selection process. In substance, the need is to achieve a balance in the participatory role of the executive and the judiciary so that neither branch has the veto power nor the scope for any arbitrariness or nepotism. The matter is being debated in the Parliament. Let us hope the outcome is satisfactory.

The important issue of the need to codify the parliamentary privileges is also dealt with. Recognition of judicial review in case of violation of a fundamental right is a safeguard in the absence of codification of privileges for the protection of constitutional rights. The decision in the JMM Bribery case needs to be overruled unless rendered infructuous by legislation.

The impact of some legal luminaries on the profession who were observed closely by the author, and his own sundry reflections are an interesting contribution to the legal history. The author's interest in the game of cricket, like mine, has focused on the commonality of 'fairness' as the essence of both—cricket and the rule of law. We have been used to identifying cricket with '*fairplay*', but it is no longer the same. In view of the sea change in this perception because of the emanating mercenary and dubious trends, the author has emphasized the need to modify the Rules of the game for '*fairness and preserving the spirit of the game*'. Professionalism, which includes sportsmanship, is the essence of the game of cricket as also of the legal profession.

This is the message and core value of the book, as I see it; and the author's track record justifies his writings for appreciation of the rule of law as the bedrock of democracy. The book should be a valuable accretion to the law literature.

J. S. Verma

Former Chief Justice of India

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Supreme Court – Judiciary

1

The Supreme Court— Three Decades in Retrospect

This article was published in 1981 in the Journal of the Bar Council of India, (Vol. VIII, No. 3). Three decades have passed and it is interesting for the reader to consider how the issues posed in the penultimate paragraph have been tackled, including those related to the limits of judicial activism, appointments and transfers of judges and reforms to combat delay.

I will first advert to the historical perspective: a rich heritage derived from Stuart England and the framing of the American Constitution.

I will then, briefly refer to the traditions of the judiciary under British Rule in India—that will carry me to the framing of the Constitution and the views expressed during the debates as to the position of our judiciary.

Thereafter comes the most difficult task, to encapsulate and summarise three decades of the working of our Supreme Court. It is not possible in this context to evaluate the work of judicial review of the High Courts.

In this analysis, I propose to deal with each decade separately. A chronological division is not very satisfactory, but that seems to be the best way. We will examine the solid fifties, the adventurous sixties and the turbulent seventies. I shall briefly examine also (and this I consider very relevant) the interplay of important events on the contemporary political and social scene as well as the great strides taken in the development of the law in England and America.

Finally, I will try to pinpoint the emerging pattern and the problems and dangers to be faced by our judiciary in the near future.

Historical Perspective

“We have received a rich heritage from a very variegated past. But it is a treasure which can only be kept at the cost of ceaseless and watchful guarding. There is no room for complacency, for, in the absence of constant vigilance we run the risk of losing it. It can happen here.”¹ (Vivian Bose J.)

The early history of the independence of the judiciary starts in Stuart England. The fight between the Stuart Kings and Parliament ended in 1701 with the Act of Settlement. This ensured the Judges being appointed “till good behaviour” and not “till the King’s pleasure” as before. Parliament achieved this by the force of arms, by beheading Charles I and later driving away James II from the Throne.

The role of Sir Edward Coke, Chief Justice, in the fight for the independence of the Judges against the King is epic in its dimensions.

It was a cold wintry morning at Westminster Hall on November 13, 1608. James I was bent on establishing the power of the Crown in absolute terms. In his way stood Parliament and the Royal law courts. Under the leadership of Sir Edward Coke, Chief Justice, the courts had been interfering in the matter of prerogative powers, seizures and detentions and also issuing writs to review the decisions of the local, feudal and ecclesiastical courts. On that historic day the King claimed that:

“Since the Judges were but his delegates he could take any case he chose, remove it from the jurisdiction of the courts and decide it in his Royal person.”

“To which it was answered by me”, says Chief Justice Coke:

“in the presence and with the clear consent of all the Judges..... that the king in his own cannot adjudge any case.....but that it ought to be determined and adjudged in some Court of justice, according to the law and customs of England.”

To this James replied:

“That he thought that the law was founded upon reason, and that he and others had reason as well as the Judges.”

Then followed the celebrated reply of Coke which sends a thrill of pride in every lawyer and every judge after so many centuries. He said that:

“.....true it was that God had endowed His Majesty with excellent sense and great endowments of nature; but His Majesty was not learned in the laws of his realm of England and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognisance of it that the law was the golden metwand and measure to try the causes of the subjects.”

James was greatly offended and said:

“This means that I shall be under the law which is treason to affirm.”

1. *Per Vivian Bose J. in the Bidi Supply Co. v. Union of India*, AIR 1956 SC 479 (488).

To which Coke replied:

“That Bracton saith that the King should not be under man, but should be under God and law” (*Quod Rex et Lege*).²

In 1616, James I, sent a Royal Order (issued by Sir Francis Bacon as Attorney-General) to Coke and his fellow Judges, not to proceed with the hearing of an action because the King’s prerogative was in question. The Judges answered in a letter:

“that they considered that order to be contrary to law and such as we could not yield to the same by our oath.”

When summoned by the King, the other Judges caved in and humbled themselves and promised to do as the King desired. Chief Justice Coke alone stood firm and replied:

“that when the Case should be, he would do that should be fit for a Judge to do.”

The indomitable courage of this answer has inspired and thrilled every Judge and Lawyer through the centuries.

In 1616, Coke was dismissed from his position as Chief Justice of the King’s Bench. After his dismissal the courts became merely the mouthpieces of the King’s will.

In the reign of Charles I, the commissions of appointments of the Judges were changed from “appointments during good behaviour” to “appointments during the King’s good pleasure.” The famous historian Henry Hallam sums it up in the following words:

“The Courts of Justice did not consist of men conscientiously impartial between the King and the subject. Some corrupt with hope of promotion many more fearful of removal or awestruck by the frowns of power.”³

Charles I was tried and beheaded but after Oliver Cromwell and the restoration of Charles II followed the reign of James II. He was determined to restore absolute Royal Power. He tried to repeal the *Habeas Corpus* Act and the Test Act (guarantee of Protestantism). He utilised his power (in the words of Holdsworth) of dismissal of Judges to secure “a packed bench of Judges” to establish the legality of his prerogative power.

It was only after the Glorious Revolution and the Act of Settlement (1701) that the Judges’ tenure was firmly entrenched for good behaviour and made secure against the Royal Power.

The lessons of Stuart England have contemporary flavour in India. A judiciary under fear cannot function independently. Its independence can be very easily subverted in a short time. James II’s reign was for hardly for four years (1685-1688). The only method of securing an independent judiciary is to ensure that the executive can in no manner remove them, hurt them, humiliate them or virtually exile them from their hearth and home by a transfer.

2. Bernard Schwartz: *Roots of Freedom*, pp. 115-118.

3. Bernard Schwartz: *Roots of Freedom*, pp. 150-151.

The American Heritage

"If men were angels no government would be necessary."⁴ While framing the American Constitution, the Colonists and founding fathers were greatly under the spell of Sir Edward Coke. Many of them had migrated from England when Protestants were being persecuted. The famous case of *Dr. Bonham* decided by Coke considerably influenced them. That was the case in which Coke had held that the common law of reason would even control the Acts of Parliament and sometimes adjudge them to be utterly void. Here was the doctrine of judicial review in embryo.

The United States Constitution attempts to ensure the complete independence of the higher judiciary by making their appointments for life and they are only removable by a cumbersome procedure of impeachment before the Houses of the Legislature.

Alexander Hamilton had this to say about the independence of the courts:

"The complete independence of the courts of justice is peculiarly essential in a limited constitution.....Without this all the reservations of particular rights or privileges would amount to nothing."

"If the courts of justice are to be considered as bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the Judges, which must be essential to the faithful performance of so arduous a duty."⁵

The Courts Under British Rule

A vignette from the days of the British rule in India. The year 1828. The High Court of Bombay presided over by Chief Justice Sir Edward West, and two puisne Judges, Sir Peter Grant and Justice Chambers, issued writs of *Habeas Corpus* for production of one Moro Raghunath and Bapu Ganesh. They were imprisoned beyond the territorial limits of the town of Bombay. The British Governor refused to obey the writs which were returned un-executed. The Court re-issued the writs. The executive still refused to obey. By this time Chief Justice had retired and gone to England and Justice Chambers had died. Justice Grant alone constituted the Bench. On April 1, 1829 history was created. Sir Peter Grant declared that the High Court had ceased to function on all its sides and would remain closed until it received an assurance that its authority would be respected and its process obeyed. Ultimately the Judges by a Petition referred the matter to the Privy Council. The Privy Council decided that the court had no territorial jurisdiction to issue the writs and yet the bold stand of Sir Peter Grant struck a note for the independence of the judiciary. The principle that the Executive could not sit in judgment over the validity of the court's order and writs was forcefully demonstrated by him.⁶

4. James Madison: *The Federalist* No. 51.

5. Alexander Hamilton: *The Federalist* No. 78.

6. The Privy Council decision is reported at 1 Knapp 1 (PC), 12 ER 222.

Another episode from judicial history in the 1940s. Britain was locked in the Second World War; yet Sir Maurice Gwyer presiding over the Federal Court declared *ultra vires* Rule 26 of the Defence of India Rules. Rule 26 authorised preventive detention. He observed:

“Though it is well to remember that.....courts of law ought to abstain from harsh and ungenerous criticism of acts done in good faith by those who bear the burden and responsibility of government specially in times of danger and crisis, we are not on that account relieved from the duty of seeing that the executive government does not seek to exercise powers in excess of those which the legislature has thought fit to confer upon it, however drastic and far reaching those powers may be and however great the emergency which they are designed to meet.”⁷

Framing of the Constitution

The Constituent Assembly Debates clearly indicate that all participants wanted an independent judiciary. In fact, Jawaharlal Nehru said:

“It is important that these Judges should be not only first-rate but should be acknowledged to be first-rate in the country and of the highest integrity, if necessary, people who can stand-up against the executive government and whoever may come in their way.”⁸

Dr. B.R. Ambedkar expressed a similar view.

In fact, the Special Committee appointed by the Constituent Assembly to report on the powers and constitution of the Supreme Court opined that the executive should not have unfettered discretion in appointing Judges of the Supreme Court. They recommended approval by a panel. The Constitutional Advisor B.N. Rau was also of the view that the appointments to the Supreme Court should be made by the President with the approval of two-thirds of then contemplated Council of State which was to be modelled on the Privy Council. He recommended that the machinery must be such as to secure freedom from party bias.

It was a crisp and cold January morning at Delhi on 28th January, 1950. It was the first sitting of the Supreme Court of India. The Attorney-General opened the proceedings. He emphasized the vast jurisdiction and powers of the Court and observed that:

“They are wider than those exercised by the highest court of any country in the Commonwealth or by the Supreme Court of the United States.”

Chief Justice Kania replied and gave us the ideal and the norm for which our early judges were striving. He said:⁹

7. *Keshav Talpade v. Emperor*, AIR 1943 FC 1 (5).

Note: It may be mentioned that the Privy Council in the later judgment of *Sibnath Bannerji* disapproved of this decision. (AIR 1945 PC 156).

8. Constituent Assembly Debates – Vol. VIII, p. 247.

9. 1950 SCR 1.

"Under the Constitution of India, the Supreme Court is established to safeguard the fundamental rights and liberties of the people..... Clothed with the duty of performing such important functions, it is obvious that as in all democratic countries, the Supreme Court should be quite untouchable by the legislature and the executive authority in the performance of its duties. No civilised democratic society can subsist and no nation can make progress if this position of the Supreme Court is not *conceded and maintained*....."

"We hope that political considerations will not influence appointments to High Courts."

He exhorted the members of the Bar in the following words:

"While in the name of independence, confusion and disorder in society cannot be permitted, the *Lawyer's profession will naturally resist encroachment attempted in the name of law and order* on the liberty of the Subject and on fundamental human rights." (emphasis supplied)

He expressed what according to him was the role of the Supreme Court:

"The Supreme Court of India *will stand firm and aloof from party politics and political theories*. It is unconcerned with the changes in the government....." (emphasis supplied)

Has the Supreme Court lived upto this standard? Has it remained untouched by the legislature and the executive authority? What are the assaults on its powers? And more importantly, are the sentiments of the first Chief Justice of India as to the function of the Court adhered to by the succeeding Judges?

I think the spirit in which the Supreme Court started exercising powers of judicial review are truly reflected in the classic words of Justice Patanjali Sastri in the famous case of *State of Madras v. V.G. Row*.¹⁰

"If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards "fundamental rights" as to which this Court has been assigned the role of a sentinel on the *qui-vive*."

Before evaluating the work of our highest tribunal in the 1950s, let us see a few landmark cases in important areas.

Personal Liberty

On May 19, 1950, Judgments were delivered in Petition No. 13 of 1950 (*Gopalan v. State of Madras*)¹¹ which seemed certainly an unlucky petition number. A narrow and restricted concept of personal liberty completely excluded fairness and reasonableness of procedure in enacted law. The concept of "due process" was eliminated by one stroke. The freedoms enumerated in Article 19 were

10. 1952 SCR 597 (605).

11. *A.K Gopalan v. State of Madras*, AIR 1950 SC 27.

regarded as un-connected with Article 21. If law was enacted, all life and liberty would vanish. Of course, subject to Article 14 and Article 32.

M.K. Nambyar, one of our great constitutional lawyers who argued the case, described the decision later in the following terms:—

“Almost at the inception of the Constitution at the very threshold of its life, one of the main articles declaring life and liberty as Fundamental Rights became still-born.”¹²

The mischief of this decision was not to be laid at rest till almost at the end of the seventies. It was a slow and step by step process. *The Bank Nationalisation* case,¹³ *Sambhu Nath Sarkar*,¹⁴ *Haradhan Saha*¹⁵ *Khudiram Das*¹⁶ and finally *Maneka Gandhi's* case¹⁷ almost totally demolished it.

Equality—Discrimination

During the first decade, the doctrine of equality, the concept of discrimination and the theory of classification were clearly evolved and by and large have stood the test of time. There has been sophistication and developments in the later decades but a number of statutes and orders were struck down with the sword of equality. *Suraj Mal Mohta*¹⁸ (*Income-tax Investigation Commission* case) is a case in point. *Anwar Ali Sarkar*¹⁹ (Special Courts Case) however met with immediate fatality, after *Kathi Rawat's*²⁰ case.

In the field of equality and discrimination, however, two not so well known cases are of prime importance. These strong judgments, I believe, destroyed a pernicious tendency in its infancy. Legislations specially made for individuals in an effort to resolve disputes and depriving them of their rights and right to adopt the normal process of law were struck down.

In *Ameerunnissa Begum's* case²¹ (Mukherjea J.) the Waliuddowla Succession Act was struck down. It tried to end certain disputes as to succession to the personal estate of a Nawab in Hyderabad. The claims of the Petitioners were dismissed on the basis of an adverse report by the State's Legal Adviser. The aggrieved parties were prevented from agitating their rights in a court of law unlike other citizens. The Court held the legislation as “arbitrary and unreasonable” and, therefore, violative of Article 14.

One sees the seeds of the explosive extension of Article 14 in this phase which was carried through in *Royappa's* case in the Seventies.

12. Swarajya: 1964: Annual Number – p. 49 (61).

13. *R.C. Cooper v. Union of India*, AIR 1970 SC 564.

14. *Sambhu Nath Sarkar v. State of West Bengal*, AIR 1973 SC 1425.

15. *Haradhan Saha v. State of West Bengal*, AIR 1974 SC 2154.

16. *Khudiram Das v. State of West Bengal*, AIR 1975 SC 550.

17. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

18. *Suraj Mall Mohta and Co. v. A.V. Visvanatha Sastri*, AIR 1954 SC 545.

19. *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75.

20. *Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123.

21. *Ameerunnissa Begum v. Mahboob Begum*, AIR 1953 SC 91.

But still more instructive is a striking down of the Bihar Sathi Lands (Restoration) Act in *Ram Prasad Sahi's* case.²² The Congress Working Committee went into certain complaints and decided that certain villages in the Bettiah Estate were to be restored to the erstwhile disqualified owners.

Thereupon, the Act was passed to deprive the owners of these lands. Chief Justice Sastri compared the legislation to English Bills of Attainder and castigated special legislation directed against named persons because a political party had so decided. Justice Mukherjea in his judgment described it as the worst form of discrimination.

It is noteworthy that one hardly comes across legislation of this type after this stern warning of "hands-off" by the Supreme Court.

Justice Vivian Bose in his inimitable prose captured the essence and soul of Article 14. He said:

"Article 14 sets out to my mind an attitude of mind, a way of life rather than a precise rule of law." (*The Bidi Supply* case)

He further observed:

"That the Constitution is not for the exclusive benefit of Governments and States..... It also exists for the common man for the poor and the humble.....for the 'butcher, the baker and the candlestick maker'." ²³

Right to Property

One need not dilate on these cases. *Chintamanrao*,²⁴ *Bella Bannerjee*,²⁵ *Dwarkanadas Srinivas*,²⁶ *Subodh Gopal*,²⁷ are well-known cases. The legislature after each invalidation, particularly in relation to acquisition and compensation, started to plug the loopholes by amendments to the Constitution. Ultimately in 1978-79, the Forty-Fourth Constitution Amendment was passed, which deleted property rights under Article 31 and Article 19(1)(f) from Part III.

This decade can be characterised as the era of the conservatives. The approach, restraint and manner of judicial review is reminiscent of the Privy Council. While giving the greatest deference to legislative judgment, the Supreme Court in various areas acted with firmness and resolve in striking down impermissible legislative action. Parliament reacted by passing some constitutional amendments particularly in relation to land reforms and property rights. In the area of personal liberty, the condition in the country may be borne in mind. The Kashmir War and the communal disturbances before partition were fresh in the minds of the people. Nehru, throughout the Fifties, was at the height

22. *Ram Prasad Narayan Sahi v. State of Bihar*, AIR 1953 SC 215.

23. *Bidi Supply Co. v. Union of India*, AIR 1956 SC 479 (485, 487).

24. *Chintamanrao v. State of Madhya Pradesh*, AIR 1951 SC 118: 1950 SCR 759.

25. *State of West Bengal v. Bella Bannerjee*, AIR 1954 SC 170: 1954 SCR 558.

26. *Dwarkanadas Srinivas v. Sholapur Spinning and Weaving Co. Ltd.*, 1954 SCR 674: AIR 1954 SC 119.

27. *West Bengal v. Subodh Gopal*, AIR 1954 SC 92: 1954 SCR 587.

of his power and was regarded with great affection and respect by all sections of the citizenry. This was, therefore, an era where solid foundations of judicial review were laid down without any acrimonious confrontation either with the legislature or the executive.

The Supreme Court in the 1960s

Let us look at the contemporary political and social calendar. The more one reflects on the performance of the Supreme Court, the more one is convinced that there is a strong co-relationship between the judicial review of legislative and administrative action and political and contemporary events.

On the political field, in October 1962 India faced the Chinese aggression. The ascendancy of the Congress Party was no more and it was losing popularity fast in several northern States. The increasing corruption and arbitrariness in the administration was the order of the day. In September 1965 came the Pakistani aggression. In 1969 July/August, the ruling Congress Party itself suffered a convulsion and split.

On the judicial scene, one sees judges with massive intellects and dominating personalities – Gajendragadkar, Subba Rao, Hidayatullah, J.C. Shah were men of extraordinary talent and intelligence. The third important factor influencing the Sixties is the landmark decisions in England and America. They have had a profound influence on our Indian decisions as we shall notice. *Ridge v. Baldwin*²⁸ gave an explosive dimension to natural justice. *Anisminic*²⁹ and *Padfield*³⁰ revolutionized the *certiorari* jurisdiction. *Conway v. Rimmer*,³¹ put an end to the oppressive doctrine of Crown privilege after almost 25 years. Professor H.W.R. Wade in his Hamlyn Lectures (1980), characterised *Ridge v. Baldwin* as the starting point of what he picturesquely described as “the Renaissance of Administrative law”.

Gideon’s Trumpet (*Gideon v. Wainwright*)³² had been sounded in America securing the right of counsel to the accused. The Warren Court in the U.S.A. was in full-cry expanding the horizons of civil liberties. It embarked successfully upon the most active role of the Supreme Court in the history of the United States. Its tidal waves crossed the Atlantic engulfing England and its salutary effects were also felt in India. In England Lord Denning was carrying out a revolution in Administrative law under his charismatic leadership.

Landmark Decisions of the 1960s

(a) Natural justice comes into its own in India with two landmark decisions of *Binapani Dei*³³ and *Kraipak*.³⁴ Personal hearing becomes an essential requirement

28. *Ridge v. Baldwin*, 1964 AC 40.

29. *Anisminic Ltd. v. Foreign Compensation Commission*, (1969) 2 AC 147.

30. *Padfield v. Minister of Agriculture Fisheries and Food*, 1968 AC 997.

31. *Conway v. Rimmer*, 1968 AC 910.

32. *Gideon v. Wainwright*, 372 US 335: (1963) 9 Law ed 2d 799.

33. *Orissa v. Binapani Dei*, AIR 1967 SC 1269.

34. *A.K. Kraipak v. Union of India*, AIR 1970 SC 150.

of all administrative orders which have civil consequences. No longer is the administrator entitled to decide behind the back of the citizen. The distinction between *quasi*-judicial power and administrative power is swept away by Kraipak. This decision carries our administrative law well beyond the English and American decisions. In the *Anglo-Afghan*³⁵ case, a moral dimension is added to governmental action. The doctrine of equitable or promissory estoppel is revived. The government is bound to fulfill its promise if the citizen altered his position to his detriment and the court would enforce such an obligation by necessary directions. In *Pratap Singh's*³⁶ case, a powerful Minister (Kairon) who tried to wreak vengeance was exposed and absence of denial on affidavit of allegations of *mala fide* proved fatal. All this is a judicial reaction to arbitrariness, casualness, unfairness and increasing corruption in the area of administration. The Court was sharpening its tools to do justice to the citizen in response to the dynamics of social or political conditions. It was going ahead with full steam with a no-nonsense approach.

(b) 'The Court strikes down an expropriatory and arbitrary tax law, Travancore-Cochin Land Tax Act, 1957. It holds that it is not only discriminatory but procedurally unreasonable (*K.T. Moopil Nair*).³⁷ A new dimension is added to the equality clause. Unequals cannot be treated equally and lack of classification can be regarded as fatal. The Court is anxious to undo clear injustice done by the legislature by similar treatment of unequals. These are the ratios of several cases including *New Manek Chowk*³⁸ and *Raja Reddy*.³⁹

(c) 'The year 1967 marks a watershed in Indian Constitutional history. The *Golak Nath* case⁴⁰ (the most controversial decision in the history of our Supreme Court) the court by a majority of 6 to 5 assumes the power to strike down a Constitutional amendment. The ground is that it is "Law" within the meaning of Article 13 and, therefore, cannot abridge or take away Fundamental Rights.' It also adopts the theory of prospective over-ruling and declares that:

"Parliament will have no power, from the date of this decision to amend any of the provisions of Part III of the Constitution so as to take away or abridge the Fundamental Rights enshrined therein."

The Judges for the first time rejected the Blackstonian theory of declaring the law and consciously intervened to make the law. This is the first open and unabashed assertion of the law-making role of the judiciary.

(d) 'A Division Bench of the Uttar Pradesh High Court issues a show cause and grants interim bail to a pamphleteer detained in jail for contempt of the U.P. Vidhan Sabha. The Assembly resolves that not only the pamphleteer but the two

35. *Union of India v. Anglo Afghan Agencies*, AIR 1968 SC 718.

36. *Pratap Singh v. State of Punjab*, AIR 1964 SC 72.

37. *Kunnathath Thathunni Moopil Nair v. State of Kerala*, AIR 1961 SC 552.

38. *New Manek Chowk Spinning and Weaving Mills Co. Ltd. v. Municipal Corporation of the City of Ahmedabad*, AIR 1967 SC 1801.

39. *State of Andhra Pradesh v. Raja Reddy*, AIR 1967 SC 1458.

40. *I.C. Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

judges are in contempt and they be brought in custody before the Assembly. The judges as Petitioners under Article 226 approach the High Court for relief including stay. A Bench of 28 judges hears the matter and issues a Rule and grants stay. The High Court make a show of strength. The message is clear. Dare if you will, try and arrest all of us. An unprecedented crisis is created. The President intervenes and makes a Reference to the Supreme Court.’

In a momentous judgment,⁴¹ the Supreme Court upheld the power of Judicial Review. It held that no contempt was committed by the judges and the High Court had jurisdiction to deal with the Petition of the pamphleteer. It also held that the Assembly had no jurisdiction to direct production of the two judges and the Advocate in custody or to call for their explanation.

The Turbulent 1970s

The Seventies divide themselves clearly into three broad periods. The first ends with 24 June, 1975 *i.e.* before the proclamation of Internal Emergency. The second ends with March 1977 with the revocation of the Emergency and a new Janata Government in power at the Centre and the third ends with the end of 1979 and the election results of January, 1980 when the Congress (I) is voted back to power.

Landmark Decisions of the 1970s

(a) ‘In a historic judgment in *Kesavananda Bharati’s* case,⁴² a 13 Judge Bench of the Supreme Court strikes down a constitutional amendment in part. *Golak Nath* is expressly overruled but the theory of basic structure is propounded to imply a limitation on the amendment power.’ In other countries constitutional amendments have been struck down but only if there is defect “in manner and form” (*i.e.*, requisite majority or consents have not been obtained); but never on the ground of inherent or implied limitations of the constituent power. The basic structure theory is adopted by a majority of 7 to 6. This decision has such far reaching consequences that it is probably the greatest blow in any civilized country by the Judiciary for the preservation of the democratic form of Government. *Golak Nath’s* case was expressly overruled and given a quietus. This view has now been followed in other cases and the Supreme Court has struck down other constitutional amendments on the principle of the basic structure.

In *Indira Nehru Gandhi v. Raj Narain*,⁴³ Article 329A(4) was struck down. In *Minerva Mills*,⁴⁴ Articles 368 (as amended by section 55 of 42nd Constitution Amendment Act) and 31C part were struck down and *The Urban Land Ceiling* case⁴⁵ section 27 of the impugned Act was struck down for the first time piercing the Ninth Schedule.

(b) The record of the Supreme Court on preventive detention is outstanding. The court has, by a series of decisions, given vitality to the procedural safeguards

41. In re, Under Art. 143, Special Reference No. 1 of 1964: AIR 1965 SC 745.

42. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461: (1973) 4 SCC 225.

43. *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299.

44. *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

45. *Bhim Singhji v. Union of India*, AIR 1981 SC 234.

contained in Article 22 and in statutes dealing with preventive detentions. It has shown the greatest solicitude for detenus deprived of their liberty without trial. Unreasonable delay in dealing with representations, vagueness of grounds, non-supply of material to enable making of an effective representation and any type of lethargy in the discharge of duties of the administration have led to invalidating of detention orders.

In *Khudiram Das* case,⁴⁶ most of the well-established principles of nullifying administrative action were brought into the field of subjective satisfaction, a condition for preventive detention. A dangerous power was being gradually "cribbed and confined".

The second period starts with 25th June, 1975, the date of the proclamation of Internal Emergency. The *Habeas Corpus* Case (ADM Jabalpur)⁴⁷ brought down the reputation of the Supreme Court to its lowest ebb. It was rendered during the Emergency under the leadership of Chief Justice Ray. In the words of a leading constitutional authority, H.M. Seervai:

"Coming at the darkest period in the history of India, it made the darkness complete".

An effort to review the *Kesavananda Bharati* case in November 1975 by a Constitution Bench of 13 Judges did not succeed. Chief Justice Ray was unable to carry most of the Judges with him and had to dissolve the Bench after 2 days' hearing without making any speaking Order and in a most unprecedented manner.

With the passage of the 42nd Amendment, the wings of the higher judiciary were substantially clipped. It appeared to be the beginning of the end of an independent judiciary.

The third phase is the post-Emergency period. There is an atmosphere of freedom and articulation, after the dark days of the Emergency. I believe the Supreme Court entered one of its most creative periods in the last three years of the Seventies.

In the short span of the Janata Administration only one event of significant interest may be noticed. Preventive detention was sought to be permanently institutionalized by amendments to the Criminal Procedure Code. Some of the erstwhile critics of preventive detention publicly supported the measure. Power is a heady wine and self-interest difficult to resist. Happily, the Janata M.P.s revolted and the measure was dropped.

In the landmark case of *Maneka Gandhi*, a conscious attempt was made to widen Article 21 and natural justice was given a very firm foundation. The concept of procedural due process was sought to be injected in Article 21.

In the now-famous six *Hussainara* cases,⁴⁸ the rights of undertrials received an explosive enlargement. Fair and reasonable procedure became the requirement of Article 21. A poor litigant ought to have the benefit of legal services in certain

46. *Khudiram Das v. State of West Bengal*, AIR 1975 SC 550.

47. *Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207.

48. *Hussainara*, I II, III, IV, V and VI, (1980) 1 SCC 81 (91, 93, 98, 108, 115).

situations as part of his Fundamental Rights. Here was *Gideon's Trumpet*⁴⁹ finding its echo in the portals of our Supreme Court. These series of judgments would mean a revolutionary enlargement of the right to life and was one of the last blows to the Gopalan judgment. Similarly, relief was given against hand-cuffing of prisoners.

In a milestone decision in the case of the *International Airports Authority*,⁵⁰ the power of distributing patronage or largesse by the government through contracts or otherwise was brought under judicial review. Arbitrary dealings or discriminatory dealing with government's own property was now subject to the test of fairness and lack of arbitrariness.

The meaning of the word 'State' in Part III was considerably enlarged to include State Corporations and instrumentalities.

The doctrine of Promissory Estoppel was given a scholarly and juristic foundation and the executive was held to its promise in the case of *Motilal Padampat*.⁵¹

The writ jurisdiction under Article 32 and the Special Leave Jurisdiction under Article 136 were given a dynamic and activist direction. The court declared that it was not bound merely to issue the traditional writs and directions. It would impose a positive scheme and give affirmative redress. In the *Medical Admissions* case,⁵² the Court framed a scheme with directions to administer it. The adversary system of trial was gradually being given a go by in public interest litigation. Directions were being given against parties and authorities against whom no relief was claimed and against whom there was no cause of action merely with a view to giving affirmative redress. Thus, the Medical Council and the University were directed to appear before the Supreme Court to enable it to work out a scheme. The Court would also give relief to people who had not come before it seeking relief.

This and the *Hussainara* Judgments mark a complete break with the traditional exercise of writ jurisdiction. The Court has now openly stated that it has an activist approach, and it will act as an instrument of social reform.

Emerging Patterns – Some Problems

In the last three years of the Seventies, the Supreme Court has basically changed in its manner and method of functioning. Under the leadership of the present Chief Justice and his senior colleagues, the ethos has changed. There is a great desire to remedy the smallest injustice for the littlest man or woman. The Court has truly become the conscience of the entire judicial system. In their desire to do justice and their intolerance of the smallest injustice, the Courts will interfere and throw their weight in the smallest litigation. This means a great congestion of the docket of the Court and a flood of petitions. The Court is overwhelmed by a tidal wave of people having a sense of injustice because

49. *Gideon v. Wainwright*, 372 US 335: (1963) 9 Law ed 2d 799.

50. *Ramana Dayaram Shetty v. International Airport Authority of India*, AIR 1979 SC 1628.

51. *Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh*, AIR 1979 SC 621.

52. *State of Kerala v. T.P. Roshana*, AIR 1979 SC 765.

they feel that they will have a sympathetic ear in the highest Court. But this great virtue has also a drawback. Cases cannot be expeditiously heard and the arrears are mounting. Many constitutional matters have to wait their turn. This is one of the problems we must consider.

The dilemma is to have expedition without curtailing the great beneficent power exercised by the Court.

Some of the other problems that will have to be faced in the Eighties by our highest judiciary have already started casting their shadows. The Emergency transfers stand unequivocally condemned by all five Judges of the Supreme Court in the historic judgment of *Union of India v. Sankalchand Sheth*.⁵³ There is however one clear and happy commitment. The Law Minister has said that he does not want committed Judges except in the sense of their being committed to the Constitution and further that the manner and mode of transfers can be left to the Chief Justice of India.

Assurances, however, are not legal rights and assurances have been known to be broken. One cannot easily forget the then Law Minister's assurance in 1963 on the floor of the House while debating the Constitution Fifteenth Amendment Bill. After adverting to the unbroken convention in the matter he assured the House that there has been no case of a transfer without the consent of a High Court Judge.

It is well to remember what Edward Coke advised Parliament at the time of the discussion on the Bill on the Petition of Rights and at a time when the King was sending soothing messages and assurances. Coke said that:

"It was the law of the realm that counted not mere gracious promises from the Throne. Messages of love never came into a Parliament. Let us put up a Petition of Right. Not that I distrust the King but I cannot take his trust but in a Parliamentary way."⁵⁴

The result was the famous Petition of Rights enacted as a law, the second great Constitutional document in English history after Magna Carta.

I have already indicated the highly activist role of the Court in some decisions. The adversary system has disappeared in public interest cases. Thus judges are consciously utilizing their powers in making law which carries them neck-deep in policy matters. Taking their cue from the American apportionment and desegregation decisions, the Court has given positive orders in admissions to educational institutions.

Prof. H.W.R. Wade, in his recent Hamlyn lectures, has referred to Lord Devlin's comment that:

"The British have no more wish to be governed by judges than they have to be judged by administrators."

There is much truth in this observation. Sometimes, an overactive thyroid may be more harmful than an underactive one.

These then are the three great questions in the coming decade.

53. *Union of India v. Sankalchand Sheth*, AIR 1977 SC 2328.

54. Bernard Schwartz: *The Roots of Freedom*, pp. 128-192.

First, How far Judicial Activism? What should be its limits? What are the dangers if the system is overstrained? *Second*, Is a Constitutional Amendment necessary insulating the higher judiciary completely from the executive both in the field of appointments and transfers? *Third*, What are the possible lines of reform by which delays in disposal of the cases in the Supreme Court can be neutralized without the Court's lustre in doing justice to the smallest man being dimmed?

It is said that England's Constitutional history is obliged far more to its wicked than to its righteous monarchs. I am sure that greater the assaults on our judiciary, the stronger it will become, because the expression used for the American Supreme Court that "The Republic endures and this is the symbol of its faith", truly applies to our Supreme Court.

2

Judging the Judges

This article was published in The Indian Express on 5 December, 2002. It advocates vigorous in-house action to repair the damage caused by judicial misconduct. Public perception is that this option was not followed.

“A judicial scandal has always been regarded as far more deplorable than a scandal involving either the executive or a member of a legislature,” said our Supreme Court.

Some High Court judges have attracted the unflattering attention of the media, the bar and the public in recent weeks. There are allegations against three sitting judges of the Punjab High Court for using their influence in selections by the Punjab Public Service Commission.

On the initiative of the Chief Justice of India, a Committee of three State Chief Justices is examining the matter. The news from Rajasthan is still more alarming. Press reports indicate the involvement of a Deputy Registrar of the High Court in approaching a litigant lady doctor for sexual favours as a quid pro quo for helping her in a pending litigation with the connivance of a sitting judge. Women’s organisations in Rajasthan have reportedly made a precise and particularised complaint mentioning the judge involved supported by audio tape evidence of a conversation at a meeting on October 18.

In Karnataka, the media reports that the *Dussehra* festive spirit overwhelmed some members of the higher judiciary when, on November 3, they indulged in activities unbefitting of a judge in the company of lady lawyers at a resort on Hunsur Road, Mysore. The Indian Federation of Women Lawyers Bangalore and women NGOs have demanded a thorough and transparent investigation and appropriate follow up action.

The Mysore City Police Commissioner Chandrashekhar on November 10 made a significant statement at a press conference about the alleged incident: “Normally, police would have information in advance if members of the judiciary are on an official visit to the city. But I did not have any information about the official visit of the members to the city on Sunday last. I don’t know if they were on an unofficial visit”. (Deccan Herald, November 11).

It is reported that the inquiry ordered by the Chief Justice of Karnataka has come out with no pertinent facts and the police could not find in the guest lists in the resorts at Hunsur Road any name that could be linked to judicial officers.

These reports raise far-reaching issues about judicial misconduct but equally importantly raise issues of women's rights against sexual harassment and vulnerability of women against exercise of coercive judicial power.

In the landmark *Vishaka* case, the Supreme Court, speaking through Chief Justice Verma, laid down guidelines against sexual harassment of working women and the right to a safe working environment. Can there be no vigorous and searching investigation to ascertain the truth? A minister, even a Prime Minister can be investigated, interrogated and charged but what is the mechanism of bringing to book a deviant judge?

The Constitution Review Commission headed by the highly respected former Chief Justice Venkatachaliah in a Consultation Paper stated "there has been of late public concern over judges... conducting themselves in an un-judge like manner".

The Mysore police are concerned with the commission of a crime and not with investigation of improper conduct. The following matters require further investigation: The record of guests at the resorts at Hunsur Road, according to the police, have not revealed any names linked with judicial officers.

Have fictitious names and addresses been given? Was any official transport used? If private transport was used, to whom did it belong? Did security officers looking after safety of judges maintain records? Did they show any movements of the dignitaries?

Are the judges of the High Court willing voluntarily to disclose their movements on November 3 and 4 which could rebut gossip and nail the rumours? It would certainly be an intrusion on their privacy but sacrifices are required to be made by persons exercising public powers and occupying position of public trust and in the interest of transparency, accountability and truth.

The challenge is whether under the existing legal and judicial framework a vigorous investigation by trained and skilled police personnel statutorily empowered and authorised by law to interrogate and investigate can be marshalled to find out the facts.

It is apparent that no inquiry that is not preceded by such a vigorous investigation will yield any result and will certainly not inspire public confidence. A mechanism and machinery is capable of being evolved on the strength of the judgment of the Supreme Court in the Veeraswami case.

A former Chief Justice of Madras faced prosecution under the Prevention of Corruption Act for being in possession of assets highly disproportionate to his known sources of income. An unregulated power of investigation by the police in the conduct of a judge would compromise and jeopardise the independence of the judiciary. It would give a weapon to the executive to undermine judicial independence. However a single dishonest judge not only dishonours himself but disgraces his office and jeopardises the integrity of the entire judicial system.

These conflicting public interests had to be balanced and harmonised. The Supreme Court, therefore, laid down guidelines and directed that “No criminal case shall be registered under Section 154 Criminal Procedure Code against a Judge of a High Court, Chief Justice of a High Court or a Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter. If the Chief Justice is of the opinion that it is not a fit case to proceed under the Act, the case shall not be registered”.

Following the same analogy, can't an investigation be initiated by highly reputed neutral police officers under statutory powers including the power of questioning and interrogating, if necessary, judges of the High Court? It may be desirable to associate a senior sitting or former judge of the Supreme Court to monitor the investigation to preserve the independence of the judiciary.

It is clear that without a searching and vigorous investigation by an agency with statutory powers of investigation very little can be achieved. It is worth recalling that the American Bar Association Code of Judicial Conduct in Canon 2 lays down: “A Judge shall avoid impropriety and the appearance of impropriety in all the judge's activities”, and further Canon 4-A “A Judge shall conduct all of the judge's extra-judicial activities so that they do not... demean the judicial office”.

As far back as 1830, in Barrington's case, the British Prime Minister stated in Parliament that “there were many disqualifications, short of legal crime, which would justify the removal of a judge”. The Supreme Court observed in the Veeraswami case that “misbehaviour by a judge, whether it takes place on the bench or off the bench, undermines public confidence in the administration of justice, and also damages public respect for the law of the land; if nothing is seen to be done about it, the damage goes unrepaired.”

Unless vigorous in-house action is taken by the judiciary to repair the damage, public opinion will call for legislative intervention by Parliament. A legislative mechanism unless properly framed may be subversive of judicial independence.

It is imperative that the higher judiciary must creatively craft and put in place a workable mechanism to meet the challenge of un-judge like behaviour. Every adversity is an opportunity. An innovative initiative by the Supreme Court under the leadership of the Chief Justice of India will be widely supported by the Bar and citizens if they perceive that the judiciary will live by the precept “Be you ever so high the law is above you”.

3

Never Judge a Friend

This article was published in The Indian Express on 11 August 2004. The issue of bias is discussed in the light of US Supreme Court Justice Antonin Scalia and his friendship with Vice President Dick Cheney (the duck-shoot incident). The vigour with which the media criticised him (without inviting any contempt) is noteworthy.

Four things belong to a Judge, runs the Socratic aphorism: to hear courteously, to answer wisely, to consider soberly and to decide impartially. If a judge has slightest financial interest, he is automatically disqualified. In other cases, a judge's conduct or behaviour may give rise to suspicion that he is biased because of his friendship with the party before him or for other reasons. In such circumstances, a judge does not sit on the bench. He recuses himself from the case.

Recently, Justice Antonin Scalia of the US Supreme Court has turned this principle on its head by refusing to recuse himself from a case in which the Vice-President of USA, Dick Cheney, his long-time friend, was the appellant. Justice Scalia had a close friend, one Wallace Carline, a businessman connected with oil companies. During vacations, Scalia regularly went to Carline's estate in Louisiana as his guest for "duck shooting". At Scalia's suggestion, and with Carline's approval, the judge invited Cheney to the duck-shoot. Justice Scalia, his son-in-law, and one of his sons joined the Vice-President in Air Force 2 and landed in Louisiana where they hunted together for three days.

Meanwhile, a litigation was begun by certain NGOs called the 'Sierra Club' and 'Judicial Watch'. They wanted disclosure of documents and information on the participation of private lobbyists in an Energy Policy Group constituted by President Bush, which was headed by Cheney. It was widely believed that the Energy Group formulated policies at the behest of private interests and powerful corporations. The Sierra Club demanded disclosure of information and records to ascertain violations of law. Such exposures, if adverse to Cheney, would put Cheney's character and integrity in issue.

The trial court passed limited orders for discovering information and records. The Court of Appeals rejected Cheney's appeal. Thereupon, Cheney and others moved the Supreme Court of the US. This case was pending in the Supreme Court when Justice Scalia accompanied Cheney for the duck-shoot.

Two Democratic Senators, Joseph Lieberman and Patrick Leahy, complained to Chief Justice Rehnquist about Justice Scalia's trip, stating that, "when a sitting judge, poised to hear a case involving a particular litigant, goes on vacation with that litigant, reasonable people will question whether that judge can be a fair and impartial adjudicator of that man's case."

The Sierra Club moved a motion before the Supreme Court asking for Justice Scalia's recusal. Under United States practice, such motion is referred to only the judge against whom it is directed.

Meanwhile, many prominent national newspapers editorially called for Justice Scalia's recusal. Justice Scalia also became the butt of many jokes on TV shows. The inimitable Jay Leno, on his Tonight Show on CNBC, joked that when Cheney was visiting the White House, he was embarrassed when security officials made him empty his pockets and out fell Justice Antonin Scalia.

Justice Scalia, in his memorandum, surprisingly argued that the Sierra Club's suggestion that he should resolve any doubts in favour of recusal might be sound advice if he was sitting on a 'Court of Appeals', as another judge could replace him. His recusal in the Supreme Court, Justice Scalia went on to argue, would mean that the appellant Cheney would require five votes out of eight (instead of nine), which would effectively mean that his recusal was casting a vote against Dick Cheney. Justice Scalia's concern for his friend was thus apparent. He rejected Sierra Club's argument that the Vice-President's own conduct was central to the case and his reputation and integrity were on the line.

"To be sure," Justice Scalia said, "there could be political consequences from disclosure of the fact (if it be so) that the Vice-President favoured business interests, and especially a sector of business with which he was formerly connected. But political consequences are not my concern, and the possibility of them does not convert an official suit into a private one."

The Federal Law for all US judges states: "Any Justice, Judge or Magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The US Supreme Court itself, in another case, speaking through Justice Scalia noted: "What matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever impartiality might reasonably be questioned." Obviously, Justice Scalia did not apply this standard to himself.

Contrast Justice Scalia's stance with that of the House of Lords in England in the famous case of the Argentinian Military Dictator General Pinochet. The House of Lords set aside its own decision against General Pinochet on the ground of bias of Lord Hoffmann, who was Director and Chairperson of Amnesty International Charity Ltd. The charity belonged to the same group as Amnesty International Ltd, which was a participant and a party as intervener. The House of Lords held that Lord Hoffmann was disqualified on the ground that he was in the position of a party to the action and was automatically disqualified. The Court reiterated the principle that justice should not only be done but should undoubtedly be seen to be done. The test was whether any circumstance or event

gave rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial.

Our Supreme Court, in a series of cases, has affirmed the principle of reasonable likelihood of bias disqualifying a judge. Justice Venkatachaliah affirmed the principle laid down by Justice Frankfurter that: "But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment."

It is difficult for a reasonable person to appreciate Justice Scalia's stand. It stretches credulity beyond breaking point. He consciously refused to recuse himself because it would be unfair to Cheney. In the process, he was unfair to the court and the concept of impartial justice.

4

Let the Lawgiver Look in the Mirror

This article was published in The Indian Express on 7 May 2005 and deals with a Judicial Code of Conduct and Accountability. The reforms suggested have not taken place.

Judicial accountability of the higher judiciary is a subject debated from time to time. The challenge is to put in place a credible, effective and enforceable mechanism to ensure judicial accountability at the highest levels — the Supreme Court and the High Courts.

Recently the problem of judicial accountability has occupied centre stage. At the third conference of CMs and High Court Chief Justices held on September 18, 2004 the Chief Justice of India R.C. Lahoti delivered his keynote address on 'Envisioning Justice in the 21st Century'. He stated: "I declare, on behalf of the Indian judiciary, the year 2005 as the year of excellence in the Indian judiciary, dedicated to reduction in arrears without sacrificing quality and rising to the highest standards of conduct and behaviour. There will be no place for any corrupt or indolent in the system. I mean business."

Dr Manmohan Singh struck a graver note when he said: "Finally with your permission, I would like to conclude by bringing up an issue which has been causing concern. The Indian judiciary, by and large, maintains high standards of efficiency and integrity. However, more than one retired Chief Justice has drawn attention to the growing incidents of corruption among certain sections of the judiciary... Accountability and transparency norms cannot, and should not, be imposed on the judiciary from outside."

The background of these concerns at the highest administrative level is worth recalling. In 1995, Chief Justice of Bombay A.M. Bhattacharjee resigned when serious allegations of financial impropriety were made. In 2002, the Punjab Public Service Commission scandal surfaced. Three judges of the Punjab and Haryana High Court were alleged to be involved in misdemeanours. In October 2002, serious allegations were made against a Rajasthan High Court judge involving a demand by him of sexual favours from a litigant lady doctor. The judge resigned. An Additional Judge of the Delhi High Court had to resign

when serious allegations surfaced arising from telephone surveillance of illegal dealings by a middleman.

Three Karnataka High Court judges and their alleged escapade in a Mysore hotel hit the headlines in October/November 2002. In most of these cases, committees were appointed by the Chief Justice of India but the reports were never disclosed. In May 1997, under the active encouragement and leadership of Chief Justice J.S. Verma all judges of the Supreme Court unanimously adopted the Restatement of Values of Judicial Life. It was to serve as a guide to be observed by judges, essential for an independent, strong and respected judiciary. It consists of 16 clauses. Two of the important ones are:

- (1) Justice must not merely be done but it must also be seen to be done. The behaviour and conduct of members of the higher judiciary must reaffirm the people's faith in the impartiality of the judiciary. Accordingly, any act of a judge of the Supreme Court or a High Court, whether in official or personal capacity, which erodes the credibility of this perception has to be avoided.
- (16) Every judge must at all times be conscious that he is under the public gaze and there should be no act or omission by him which is unbecoming of the high office he occupies and the public esteem in which that office is held.

Pursuant to this Restatement of Values of Judicial Life, a panel of the Supreme Court devised an in-house procedure to take suitable remedial action against errant judges. We have thus in place a structure approved by the higher judiciary embodying a code of conduct and an in-house procedure to implement it. This code of conduct and the in-house mechanism have no statutory support. The lacunae and lack of statutory support have been noticed by the Supreme Court.

The Supreme Court has held that the code of conduct embodied in the Restatement of Values has no legal force and there is no adequate method or machinery to enforce the code of conduct and the CJI has only a moral authority. In a PIL the court rejected a prayer for disclosure of the report relating to the incident involving the Karnataka High Court judges. Two former Chief Justices of India M.N. Venkatachaliah and J.S. Verma have publicly expressed their views in favour of statutory powers for the CJI to discipline judges.

The former NDA government proposed the 98th Constitutional Amendment Bill to set up a National Judicial Commission. The proposal was fundamentally flawed as it had a most objectionable element. The attempt was to induct the Law Minister and a nominee of the Government on the proposed National Judicial Commission. Lobbying and trade-offs with the executive could have arisen. Judges should be judged only by their peers otherwise the independence of the higher judiciary would be subverted. Thus, there is complete consensus and agreement between the present administration and the Supreme Court that accountability must be to a body structured by the judiciary itself. This consensus must be implemented by giving statutory powers to the Chief Justice of India and committees appointed by him to inquire into allegations and make

reports. These reports must be in the public domain and citizens must have access to them. Sunlight, it is said, is the best disinfectant. Legislation should be immediately framed to implement and enforce the above consensus on in-house procedure and Restatement of Values.

The judiciary, the administration and the Parliament must seize this opportunity because it may not recur. The in-house mechanism may be regarded by many as imperfect, inadequate and with many shortcomings. But it is a good workable mechanism on which there is a broad consensus and is a major step forward.

5

In the Lawyers' Court

This article was published in The Indian Express on 10 February 2007 and deals with an interview of former Chief Justice of India Y.K. Sabharwal and his response to complaints against judges. He emphasised the importance of the opinion of the Bar. No credible and transparent mechanism has yet been fashioned to ascertain the opinion of the Bar.

Our Supreme Court has observed that, "A single dishonest judge not only dishonours himself and disgraces his office but jeopardises the integrity of the entire judicial system... A judicial scandal has always been regarded as far more deplorable than a scandal involving either the executive or a member of the legislature".

Former Chief Justice of India Y.K. Sabharwal has delivered some seminal judgments, for which he will always be remembered — the Bihar governor's case, the Ninth Schedule case, the police reforms case. But he has done more. As a serving Chief justice of India, he acknowledged publicly that the opinion and views of members of the Bar are taken into account on questions regarding the integrity of High Court judges.

Before demitting office he was frank and forthcoming. The Indian Express (January 14, 2007) reported: "Justice Sabharwal also backed Justice Jagdish Bhalla of the Allahabad High Court. He said that Justice Bhalla's wife was alleged to have bought properties worth Rs 2 lakh while the value was in crores. Keeping in mind "the perception of the local Bar is most important to decide the conduct of the judge", Justice Sabharwal said. He said many senior lawyers of the Lucknow Bar came and met him. "I was shown several documents and papers pointing a higher value so that people can get more compensation, so here I was faced with a Bar talking in one voice about Justice Bhalla and a few lawyers in Delhi against him," he admitted as he went with the Bar there. "No Bar would favour a corrupt judge so the best barometer is the local Bar," Justice Sabharwal indicated.

The Hindu report (January 14, 2007) is along similar lines and quotes Justice Sabharwal to say that, "The leaders of the Bar from Allahabad were called and the issue was discussed with them. The local lawyers who were in the know

of things denied that there was any truth in the allegations and only thereafter Mr Justice Bhalla's name was considered and the matter was now pending with the government".

The controversy came into the public domain when Tehelka (December 30, 2006) published a report and an interview with former law minister, Shanti Bhushan. The gist of the allegation in the report was that a large plot near Noida Expressway was bought by Renu Bhalla, wife of Justice Bhalla, at a low price from sellers with a dubious reputation. Two reports by concerned officials described the sellers as "land mafia", who had illegally grabbed a portion of the land of the "Gram Samaj". These official reports valued the plot at over Rs 7 crore which was sold to Renu Bhalla for Rs 5 lakh, and the sellers were facing charges in several serious criminal cases. The transaction was evidenced by two sale deeds.

Was the collegium of four senior judges part of the interactions with leaders of the Bar from Allahabad? Who were these leaders of the Bar? How were they chosen? Did they investigate the correctness of the valuation of the land? On what material did they reject as incorrect the two reports from the concerned officials? Was any investigation made by any responsible authority to ascertain the correctness of these two reports?

The latest nine-judge bench judgment of the Supreme Court requires the Chief Justice to ascertain and forward the views of the collegium of himself and four senior-most Judges to the Central Government in case of transfer of a High Court judge because a "wide-based decision-making such as this, eliminates the possibility of bias or arbitrariness". This article is not concerned with this controversy, which will take its natural course. What is heartening to note is that the opinion of the concerned Bar has decisively weighed presumably with the collegium.

"No Bar would favour a corrupt judge, so the best barometer is the local Bar," is the principle which has now gained respectability.

The Law Day speech of the President of the Supreme Court Bar Association, M.N. Krishnamani, expressed many concerns with the functioning of the judiciary and the mode of appointment. He said, "We need a statutory code of conduct for judges." He quoted former Chief Justice J.S. Verma who had said, "The need of the hour therefore is to realise this clear and present danger as an imminent threat to the independence of the judiciary from within. A danger from within is destructive like a termite which eats into the vitals."

Justice Sabharwal has broken from precedent and participated in the 'Walk the Talk' show anchored by Shekhar Gupta. This is a refreshing and stimulating development, which the Bar and the citizens must welcome as leading to transparency and frankness in the inner working of the judiciary.

Justice Sabharwal warned against too cosy a relationship between the three wings, the executive, the legislature and the judiciary, as it would affect the independence of the judiciary and would pose a danger to democracy. Equally, too cosy a relationship between the leaders of the Bar and the judiciary is increasingly being perceived by many members of the Bar as counterproductive.

If the opinion of the Bar counts and is to be decisive, a mechanism must be evolved as a first step, to ascertain the opinion of the Bar. The matter must be handled delicately, responsibly and with circumspection. The leaders of the Bar not enjoying a cosy relationship with the judge and the Bar Association must speak up when the integrity of a judge is in question, notwithstanding the risk faced by active members of the practising Bar of displeasing the members of the court where they are practising.

We are facing a grave problem in the functioning of the higher judiciary, but this break with tradition by the retiring Chief justice of India frankly and forthrightly expressing views in the media and giving decisive prominence to the views of the Bar is an opportunity which all the leaders of the Bar and the Bar Associations all over India must actively pursue without fear of personal consequences.

6

Judicial Activism and Democracy

This article was published in the Hindu on 2 April 2007. It argues that judicial activism has provided a safety valve to Indian democracy and adds much needed oxygen to the democratic experiment, notwithstanding some aberrations.

Lively criticism of judicial activism encroaching on the powers of the legislature and the executive has been voiced by many including Lok Sabha Speaker Somnath Chatterjee. Such controversies are the lifeblood of democracy and must be welcomed. On March 12, 2007, marshals were summoned in the Lok Sabha as Communist Party of India (Marxist) members stormed the well, menacingly advancing towards Shipping Minister T.R. Baalu. Dravida Munnetra Kazhagam members formed a human wall to protect him. On March 19, 2007, another scuffle took place in the Rajya Sabha when Bharatiya Janata Party member S.S. Ahluwalia and other Opposition members rushed threateningly towards Finance Minister P. Chidambaram who was protected by a cordon of Congressmen.

The Indian citizen's perception of the political class is overwhelmingly coloured by the above images. It is in this context that judicial activism has flourished in India and has acquired enormous legitimacy with the Indian public. Some glimpses from the past and a peep into the future may be rewarding.

In 1608, England was ruled by the Stuart King James I who claimed absolute power. On November 13, 1608, James entered the royal courts and claimed that he could take any case he chose, remove it from the courts, and decide it in his royal person. Chief Justice Coke answered that he could not do so and the case ought to be determined and adjudged in a Court of Justice according to the law and custom of England. The King was greatly offended and replied: "This means that I shall be under law which is treason to affirm." Coke replied: "Bracton says that the King should not be under man but should be under God and law." At that time the judges were removable by the King and had no security of tenure. Chief Justice Coke's reply was an affirmation of the judicial power while upholding the rule of law against arbitrary decisions of the sovereign. This was judicial activism at its finest.

In 1801, Chief Justice John Marshall highlighted and reaffirmed the power of the American Supreme Court to invalidate Congressional statutes in the

celebrated case of *Marbury v. Madison*, 5 US 137 (1803) John Marshall was Secretary of State in the administration of President John Adams who in the last days of his Presidency appointed as judges and magistrates more than 50 people belonging to his party. Meanwhile, Marshall was appointed Chief Justice and overlooked delivering some commissions. The incoming President Thomas Jefferson ordered his Secretary of State James Madison not to deliver these commissions. Marbury, an appointee, moved the Supreme Court for a direction against Secretary of State Madison praying that the commission be delivered to him. Chief Justice Marshall knew that if a direction was given it was unlikely to be obeyed by President Jefferson. By an act of judicial statesmanship Marshall ruled that Section 13 of the Judiciary Act under which Marbury had petitioned the court was unconstitutional and invalid and therefore the court had no original jurisdiction to grant relief. He avoided a direct conflict with the administration while highlighting and reaffirming the judicial review power to invalidate an Act of Congress.

Chief Justice Earl Warren of the U.S. was one of the great activist judges who has profoundly influenced the Indian Supreme Court. By his decisions he legitimised affirmative action by the courts and removed racial discrimination in schools by desegregation, reapportioned obsolete electoral districts, and enhanced the rights of poor accused and defendants. Warren and the judges supporting him came in conflict with their colleagues who championed judicial restraint. Bernard Schwartz recounts a public display of acrimony between Warren and Frankfurter, the latter a champion of judicial restraint. In *Stewart v. United States*, a bare majority reversed a murder conviction because of improper questioning by the prosecution. After the majority opinion was read, Frankfurter in open court characterised it as “an indefensible example of judicial nit-picking” and “excessively finicky appellate review.” Chief Justice Warren, visibly angered, said: “As I understand it the purpose of reporting an opinion in the courtroom is to inform the public and is not for the purpose of degrading this Court.” This exchange was front-page copy for the national press.

President Eisenhower a conservative Republican, was distressed by the liberal views of his appointee Chief Justice Warren. When Eisenhower was asked what his biggest mistake was, he angrily replied “the appointment of ... Earl Warren.”

High-water Mark

What was the one case that was the high-water mark of judicial activism in India? No doubt it was the judgment of the majority in *Kesavananda Bharati* (the fundamental rights case). For the first time a court held that a constitutional amendment duly passed by the legislature was invalid as damaging or destroying its basic structure. This was a gigantic innovative judicial leap unknown to any legal system. The masterstroke was that the judgment could not be annulled by any amendment to be made by Parliament because the basic structure doctrine was vague and amorphous. The judgment was severely and passionately criticised by the executive and many eminent lawyers. The immediate response of the executive was the supersession of three senior-most judges (Justices Shelat,

Hegde, and Grover) while the fourth Judge Justice A.N. Ray who had decided all major cases in favour of the Government was appointed Chief Justice. However, the critics were soon silenced. The excesses of the Internal Emergency of 1975 completely legitimised this judgment and one of its severest critics the great jurist H.M. Seervai changed his views.

Judicial activism earned a human face in India by liberalising access to justice and giving relief to disadvantaged groups and the have-nots under the leadership of Justices V.R. Krishna Iyer and P.N. Bhagwati. The Supreme Court gained in stature and legitimacy. Later, when the independence of the judiciary was threatened by punitive transfers, the court entered the arena of judicial appointments and transfers. With the increasing criminalisation and misgovernance and the complete apathy of the executive, the court (under the leadership of Chief Justice Verma and Justices Bhargava and Sen) took up the case of terrorist funding linked to political corruption through the 'hawala' route in the *Vineet Narain Case* (Jain hawala Case). A cover-up by the Central Bureau of Investigation to protect its political masters was exposed and the court monitored the investigation upholding the principle "Be you ever so high the law is above you."

During the hearing there were reports that Prime Minister P.V. Narasimha Rao was interfering with the investigation and the court passed an interim order on March 1, 1996. It directed "that the CBI would not take any instructions from, report to or furnish any particulars thereof to any authority personally interested in or likely to be affected by the outcome of the investigation into any accusation. This direction applied even in relation to any authority which exercises administrative control over the CBI by virtue of the office he holds, without any exception." In substance Prime Minister Rao was forbidden from exercising control over the CBI in relation to that case. It was a bold and courageous order and carried judicial activism to hitherto unscaled heights. The fallout of the case was resignations following initiation of prosecutions against high profile political personalities including three Cabinet Ministers, two Governors, and the Leader of the Opposition. In the next general election the ruling Congress lost power.

The courts on several occasions have issued directions in public interest litigation (PIL) covering a wide spectrum such as road safety, pollution, illegal structures in VIP zones, monkey menace, dog menace, unpaid dues by former and serving legislators, nursery admissions, and admissions in institutions of higher learning. There is no doubt that sometimes these orders are triggered by righteous indignation and emotional responses.

The common citizens have discovered that the administration has become so apathetic and non-performing and corruption and criminality so widespread that they have no recourse except to move the courts through PIL, enlarging the field for judicial intervention. If a citizen's child is attacked by a stray dog or cattle roam the streets or hospitals suffer from monkey menace and nothing is done, should not the court intervene?

The great contribution of judicial activism in India has been to provide a safety valve in a democracy and a hope that justice is not beyond reach. Judicial activism has come to stay in India and will prosper as long as the judiciary is respected and is not undermined by negative perceptions, which have overtaken the executive and the legislature. There is concern among the public about lack of transparency in judicial appointments and a sense of increasing unease because of a lack of a credible mechanism to deal with serious complaints against the higher judiciary.

The plants slowly nurtured by judicial craftsmanship have grown into sturdy trees and have blossomed with colourful and fragrant flowers. Judicial activism has added much needed oxygen to a gigantic democratic experiment in India by the alchemy of judico-photosynthesis.

7

Limits of Power – A Tribune Debate

This article was published in The Tribune on 16 April, 2007 regarding the debate on judicial activism and judicial overreach. It argues that legitimate differences of opinion on the role of the judiciary ought not to be magnified into major confrontations. Orders passed by the Supreme Court in relation to functioning of the Uttar Pradesh and Jharkhand Assemblies are discussed. The article posits that in these instances unworthy and cynical behaviour by the Executive branch led the Judiciary to overstep into forbidden areas; hard cases make bad law, yet judicial activism serves important democratic ideals and cannot be wished away.

Posturing is counterproductive

A lively debate on the limits of Judicial Activism has attained high visibility after the conference of Chief Justices and Chief Ministers.

The Prime Minister said on 8th April, 2007: “I do sincerely believe that the Judiciary, the Executive and the Legislature have an obligation both to our constitution and to our people to work in harmony. . . . Each organ must respect the roles and functions of the other. . .” ... “Courts have played a salutary and corrective role in innumerable instances. They are highly respected by our people for that. At the same time the dividing line between judicial activism and judicial overreach is a thin one. . . . We need standards and bench-marks for screening PILs so that only genuine PILs with a justiciable cause of action based on judicially manageable standards are taken up . . . The Supreme Court should take the lead in framing rules in this regard.

A distinguished former Chief Justice of India, Mr. Justice J.S Verma, in a speech made at Jabalpur on March 24, 2007 used strikingly similar language. For instance he said:

“Pratap Bhanu Mehta, President of the Centre for Policy Research, has said the evidence of judicial overreach is now too overwhelming to be ignored. . . . It has to be admitted that the line between appropriate judicial intervention and judicial overreach is often tricky”.

Justice Verma continued : “There can be no quarrel with the above observation that the line between appropriate judicial intervention and judicial overreach is often tricky . . . Inappropriate judicial intervention results in judicial adhocism or judicial tyranny . . . It is time the Supreme Court framed Rules to ensure consistency in approach of the Court in all PILs.”

The Chief Justice of India, (who addressed the conference before the Prime Minister) observed : “The application of judicial review to determine constitutionality of the legislation and to review the executive decision sometimes creates tension between the judge and the legislative and executive branches. Such tension is natural and to some extent desirable. The principle of separation of powers is kept in the forefront. . . .”

These views demonstrate a considerable amount of convergence. There is no dispute that each organ of the State must work within its constitutional limits; Judicial Review has played a salutary role; PILs have great utility in initiating corrective actions; and the principle of separation of powers must be kept in the forefront.

It is difficult to fault the Prime Minister’s views when they coincide with similar views earlier expressed.

Our distinguished Speaker Somnath Chatterjee has also repeatedly voiced concern in relation to judicial interventions relating to powers of Houses of Parliament and the State legislatures. There is considerable substance in many of these concerns. They cannot and should not be ignored.

But a debate started by the media in an effort to show sharply divergent views seems to me to be an exercise in highlighting legitimate differences and magnifying them into major confrontations.

A debate which contains sweeping generalizations and penchant criticism is both flawed and sterile. Though it makes a good copy, it is wiser to consider specific instances and identify areas and interventions where the criticism may be justified to strengthen democratic values in a spirit of accommodation.

As far back as 1982, a bench of two judges of the Supreme Court referred several questions in regard to social action litigation (another phrase for PIL) to a Constitution Bench for evolving guidelines. The reference has not seen the light of day though some of the questions have been resolved by subsequent judgments. Mr. Justice Verma in his speech also refers to draft rules framed by the Supreme Court laying down guidelines in relation to PILs which do not appear to have been finally formulated. The Prime Minister’s appeal in this connection, therefore, needs to be urgently addressed.

Two other decisions of the Supreme Court are vulnerable to criticism. Under Article 122 Parliament and under Article 212 the State legislature are complete masters of their own procedure and in the conduct of their business are not subject to the jurisdiction of any Court. In spite of these clear provisions the Supreme Court by two orders passed in February 1998 gave directions in relation to the Uttar Pradesh Legislative Assembly. It summoned a special session of the U.P Assembly set the agenda for a composite floor test and warned against disturbances.

A similar order was passed on March 09, 2005 in relation to the Jharkhand Legislature giving interim directions for holding a Session, setting the agenda for a floor test, warning against disturbance and requesting for a video-recording.

The Jharkhand order created a political storm. Speaker Somnath Chatterjee advocated a Presidential Reference. The Supreme Court order was triggered by the most cynical and unethical behavior of the Governor who ignored the claim of the Opposition NDA Chief Ministerial candidate Arjun Munda in an effort to keep in power Shibu Soren supported by the UPA Government at the centre. The Supreme Court order led to the nullification of the indefensible behavior of the Governor but was constitutionally wrong, though morally right. The opposite view was legally right but morally indefensible. A hard case made bad law.

These cases illustrate the creeping jurisdictional increase in judicial review triggered by totally unworthy and cynical behaviour by the Executive branch.

But Speaker Somnath Chatterjee's strong though unsuccessful pitch for a Presidential Reference served a great purpose. It exposed the legal and constitutional infirmity of the Supreme Court order.

This is one side of the coin but let us now look at the other side. A judge characterized 'Muslims' as not being a minority; directions are given that SSC qualification is necessary for driving license for certain vehicles; detailed directions are given to schools in Delhi regarding the admission process leading to total chaos in admissions. Such directions lead to legitimate criticism about judicial power and its excesses.

In sum, the timely warnings emanating from the Executive and the Legislature need to be addressed by the Judiciary and the legal profession. Posturing and confrontations are counterproductive. Judicial Review and Judicial Activism cannot be wished away. It is one of the pillars of our democratic way of life and the bedrock for protecting human rights. But the Courts in the process must not lose their way. The Constitution promises the Rule of Law not the Rule of Whim or Caprice whether of the administrator or the judge.

8

Primacy of Executive, a Dangerous Move

This article was published in The Hindu on 22 October, 2008.

The appointment of judges by the collegium had invited considerable criticism and the reputation of the higher judiciary was at a low ebb. The Law Minister wanted to restore the primacy of the Executive in appointments, which is criticised in the article.

The article advocates an open, transparent and merit-based selection system as the way forward.

On September 23, 2008, the Supreme Court appointed the CBI to investigate the *Ghaziabad Provident Fund Scam* case. The Court's hands were forced because appearing for the Ghaziabad Bar Association, it was pointed out by the author that the Uttar Pradesh police and the government themselves desired a CBI investigation.

The response of the executive was direct and strident. Union Law Minister H.R. Bhargava, in an interview to the *Hindustan Times* (September 25, 2008) is reported to have said: "The quality of some of the judges selected over the years was questionable" — "the system of selection by a Committee of judges (collegium) had failed" — "In a bid to maintain its supremacy, the judiciary tried to rewrite the law through a Supreme Court judgment in 1993 which gave them the powers for appointments and transfers. Merit has been ignored while give and take has thrived in the collegium system." . . .

"I feel now is the right time to have a re-look at the collegium system which has failed..."

"There was a time when the judiciary was above suspicion and people had great respect for it. The same cannot be said today; serious allegations of corruption against judges are in the public domain. It needs to be corrected."

But most alarming and disturbing was the solution offered by him. "A committee of judges could recommend names, which should be finalised after discussions between the CJI and the President. The decision of the President should be final on the advice of the Union Cabinet."

The views of the Law Minister are naïve and disingenuous. The Central government is always consulted before appointments to the High Courts and the Supreme Court. It has the infrastructure and the capacity to gather information,

which may not be available to the collegium. It has the Intelligence Bureau, the police and other sources of information. Did it not equally fail when undesirable appointments were made? Did it record in writing its dissent? The Law Minister's attack is slanted in favour of the executive. It is an attempt to restore a 'failed' discredited mechanism — universally condemned. The effort is to restore the primacy of the executive.

Our Supreme Court has earned an enviable reputation by enlarging human rights jurisprudence for disadvantaged groups. It has been a bulwark against excesses of the executive and the legislature (except during a short period of the Internal Emergency) and a pillar supporting the rule of law and our democratic freedoms. Its contributions to protecting journalistic freedom against legislative privileges, to electoral reforms and its rulings against arbitrary dismissal of State governments, censorship and gender discrimination are outstanding. It stands tall among constitutional courts in new democracies.

Historical Background

In our constitutional history, there have been tensions between the executive and the judiciary. When judicial review invalidated progressive land reform legislation in the early 1950s, constitutional amendments were fashioned to nullify the decisions. The judiciary was under criticism by the legislature and the executive as being too conservative in its approach.

There was no attack on its honesty, integrity and probity. After the judgment in the *Kesavananda Bharati* Case delivered on April 24, 1973, a powerful executive struck back. On the retirement of Chief Justice Sikri on April 25, 1973, A.N. Ray was made Chief Justice of India superseding three seniormost judges namely Justice Shelat, Justice Hegde and Justice Grover who promptly resigned. The executive said it wanted "forward-looking" judges.

The Bar stood firmly behind the superseded judges. The supersession was condemned as subversive of the independence of the judiciary. Protest meetings were held all over India. Chief Justice Hidayatullah's immortal phrase is worth recalling. He said — "One will have judges 'looking forward' rather than 'forward-looking'."

The Internal Emergency

The government resorted to mass transfers of independent High Court judges who stood up during the Emergency. Constitutional amendments were rushed through while all major Opposition leaders were preventively detained without trial. The powers of the Supreme Court and the High Courts were drastically reduced and judicial review was sought to be ousted almost completely. In the general election of 1977, the Indira Gandhi government lost power and the Janata Party formed the government under the Prime Ministership of Morarji Desai. Shanti Bhushan who had succeeded in the election petition disqualifying Indira Gandhi became Law Minister and fashioned the 44th amendment by which the powers of the higher judiciary, including judicial review, were restored. However, in 1980, the Janata government fell and Indira Gandhi was voted back to power. Again attempts were made to exercise powers of transfer against High Court judges. This was widely perceived as a threat to the independence of the judiciary and it was in this background that the Supreme Court overruled

the earlier decisions and negated the primacy of the Union executive in appointments to the High Courts and the Supreme Court, as well as transfers of High Court judges.

The final word was ruled to be with the Chief Justice of India — not his individual views — but views of senior judges after a plurality of consultations constituting the collegium.

Many of the active players in these decisions both on the Bench and the Bar regard that decision as a mistake made in asserting and giving primacy to the Chief Justice of India and the collegiums. The better view is that those two judgments were the correct prescription for the malady then prevailing and were essential in the circumstances and context to assure the independence of the judiciary.

However, things have radically changed. This is the era of weak coalitions. The Central executive has never been weaker. The threat to the judiciary is not from outside but is internal.

Crisis in the Higher Judiciary

The Ghaziabad Provident Fund Scam was followed by Rs.15 lakh in cash being sent by a law officer to a sitting judge of the Punjab and Haryana High Court now allegedly meant for another woman judge.

Justice Soumitra Sen, a serving judge of the Calcutta High Court has been identified by the Chief Justice of India as fit for impeachment. A few years ago, Justice Shamit Mukherjee of the Delhi High Court was accidentally discovered to be indulging in dubious transactions when phones of certain other officials were under surveillance by the police.

The reputation of the higher judiciary is at a low ebb. To quote from the author's article "Judging the judges" (December 5, 2002), "Unless vigorous in-house action is taken by the judiciary to repair the damage, public opinion will call for legislative intervention by Parliament. A legislative mechanism unless properly framed may be subversive of judicial independence ... Every adversity is an opportunity".

There is well-intentioned and legitimate criticism of the collegium system as now functioning. The present system of appointment requires radical restructuring — but the reform must be in the right direction. Reviving a failed system is a recipe for disaster. The final word in appointments to the higher judiciary can never be safely entrusted to fractious coalition governments — weak on governance, soft on terrorism and high on corruption. Each coalition partner will demand its quotas on the High Bench as well as the High Courts — on occasion threatening withdrawal of support. An increasing politicisation of the judges indebted to political factions is not a result "devoutly to be wished."

In our dissatisfaction with the present system, let the family silver not be stolen by the executive. Let the Bar and civil society give a clear response to the Law Minister that under no circumstances can the old system of primacy of the executive be restored.

The way forward is a transparent, accountable and open merit system, but that is another call.

9

The Judges' Assets Imbroglia

This article was published in the Hindu on 1 September, 2009 and describes the controversy over the higher judiciary not disclosing its assets and the impact of public opinion in creating a momentum after which judges voluntarily decided to declare their assets.

The controversy relating to the disclosure of judges' assets has achieved, for the moment, a happy resolution. A vigorous debate among the public, former judges, leaders of the Bar, Bar Associations, High Court judges and last but not the least the Chief Justice of India — is a sign of a vibrant democracy. The method and content of the disclosure are still opaque and may require further debate.

The contest was a thrilling and educative exercise, for every citizen. The media, particularly the electronic media, were a force-multiplier and reached many households across India. The debate will always remain a landmark and turning point in Indian legal history and will be the stuff shared by law teachers with generations of law students and citizens.

Let us briefly recount the highlights of the controversy. The first shot was fired when an application was made by one S.C. Agrawal under the Right to Information (RTI) Act seeking information “whether judges declared their assets as per the May 7, 1997 Resolution” — a resolution unanimously passed by Supreme Court judges. The demand was not for a disclosure of assets.

The redoubtable public interest crusader, Prashant Bhushan, representing Agrawal, succeeded before the CIC. This was a landmark order upholding the right of the citizen to information, in furtherance of the principles of judicial accountability.

The Chief Justice of India reacted: “We do not agree with what [the] CIC has said — we might appeal against it in Court” (*Hindustan Times*, 11.01.09).

Former Chief Justice of India J.S. Verma, who was instrumental in getting the 1997 Resolution passed unanimously, publicly opined that the assets of the Supreme Court judges were very much in the public domain (*The Indian Express*, 19.01.09).

Justice Ravindra Bhat of the Delhi High Court stayed the CIC's decision on 19.01.2009 in a writ petition filed by the CPIO of the Supreme Court and appointed F.S. Nariman as "Amicus Curiae" who declined since he had very clear views — publicly expressed — that judges must disclose their assets.

Lok Sabha Speaker Somnath Chatterjee said: "Judges of the higher judiciary should also be subjected to accountability on issues like declaration of assets ..." and added "he had allowed access to information about MPs' assets to anyone who sought it." (*The Indian Express*, 22.01.09)

Former Attorney General Soli Sorabjee cryptically said: "Whether legally bound or not, in the fitness of things, judges should declare their assets." (*The Times of India*, 23.01.09)

The argument of the Supreme Court Registry that the Resolution was purely voluntary and confidential and did not require any disclosure under any legal provision did not cut much ice, either with the Bar or the public. The Delhi High Court Bar Association resolved to support the CIC order. (*The Hindu*, 25.01.09).

After a brief summer interlude, on August 3, 2009, the introduction of the Judges (Declaration of Assets and Liabilities) Bill, 2009 in the Rajya Sabha brought the controversy to the centre-stage. The Bill contained Clause 6 prohibiting the disclosure to the public or in any other manner except in court proceedings where an offence is alleged or in proceedings involving misbehaviour. The battle-lines were drawn. The Bill supported the Supreme Court judges.

A stormy debate followed and Arun Jaitley, himself a leading lawyer, contended that the clause violated Article 19(1)(a). Ram Jethmalani said: "what this Bill does is, it creates a suspicion in the public mind that the judiciary is seeking favours from the executive — Now, this privileged position, which the judges are seeking from the executive makes them totally subservient to the executive." Some members of the ruling party joined the criticism. The passing of the Bill was deferred. Parliamentary support was not forthcoming.

The parliamentary debate triggered strong articles from former Chief Justice J.S. Verma and F.S. Nariman. Justice Krishna Iyer also threw his considerable weight in favour of disclosure. Justice Shylendra Kumar (Karnataka High Court) wrote an article supporting disclosure and, inter alia, stated "The Chief Justice of India does not have the authority to speak for all other judges" (*The Indian Express*, 22.08.09). Justice Kannan originally of the Madras High Court voluntarily disclosed his assets. Senior Advocate K.K. Venugopal is reported to have said: "I agree with the judge of the Karnataka High Court that all judges of the Supreme Court and High Courts should make a complete disclosure of their assets." (*The Indian Express*, 23.08.09)

The Chief Justice responded to Justice Kumar's article by saying "he wants publicity and such a thing is not good for a judge. Judges should not be publicity-crazy." (*The Indian Express*, 24.08.09) The stand of Justice Shylendra Kumar received wide support.

On August 27, 2009, The Hindu reported that the judges of the Supreme Court had decided in principle to put their assets on the website, but regarding the modalities — in what manner or form — no decision was taken. Transparency triumphed. Public opinion prevailed. The entire nation was happy that the Supreme Court had enhanced its own reputation by agreeing with the public perception. The decision received laudatory notices in many editorials.

The remark by the Chief Justice about the Karnataka judge, that he was “publicity crazy,” was an off-the-cuff remark — an impulsive reaction in an unguarded moment. The Chief Justice, in an exclusive interview, is reported to have gracefully said about the Karnataka judge: “He is young and has a good chance to make it to the Supreme Court on the basis of merit once he attains the required seniority — why alone an elevation to the SC, he has a good chance of becoming the CJI” (*The Times of India*, 29.08.09).

Exchanges between judges in public are not unknown in other jurisdictions. Earl Warren and Felix Frankfurter’s exchange in the U.S. Supreme Court has been recounted by Bernard Schwartz. Justice Frankfurter while dissenting observed in open court that the majority opinion was an “indefensible example of judicial nitpicking” and “excessively finicky appellate review.” Chief Justice Warren angrily retorted “that was not the dissenting opinion that was filed ... As I understand the purpose of reporting an opinion in a courtroom is to inform the public and is not for the purpose of degrading this court.”

Lord Atkin is admired for his powerful dissent in *Liversidge v. Anderson* where he stated about his colleagues: “I view with apprehension the attitude of judges who, on a mere question of construction when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive.” The majority, including Lord Maugham and Lord Wright, were not amused. They refused to talk to him. Lord Maugham wrote a letter to the *London Times* criticising Lord Atkin and defending his own judgment. Maugham was widely criticised for this unprecedented “lapse.”

In the *State of Rajasthan v. Union of India*, AIR 1977 SC 1361 acting President B.D. Jatti saw Chief Justice M.H. Beg before he wrote his judgment. Justice Goswami records in his judgment: “I part with the records with a cold shudder. The Chief Justice was good enough to tell us that the acting President saw him during the time we were considering judgment after having already announced the order and there was mention of this pending matter during the conversation.” Chief Justice Beg issued a press statement giving his views.

The current controversy has broken fresh ground. For the first time, the Supreme Court became a litigant before a High Court; for the first time, a High Court judge spoke up against the view of the Supreme Court judges — not in their judicial capacity because that is not permissible — but on a public issue with ethical dimensions; for the first time, former judges, in an effort to preserve the institutional integrity and respect of the Supreme Court, vigorously entered the fray; and for the first time, the media boldly took a critical stand against the apex judiciary.

In cricketing terms, the Supreme Court team has been bowled out against the citizens' team which prevailed. The opening fast bowling combination of Verma and Nariman created the momentum — the Rajya Sabha debate carried it forward and the final six came from a High Court judge. Meanwhile, the media rating almost touched 20-20 levels.

But there are no winners and no losers in this friendly contest — because both sides believed that they were protecting the independence of the judiciary. The only winner is Indian democracy. Have we graduated from the most populous democracy to a more robust democracy?

Clarification

The thirteenth paragraph of an article "The judges' assets imbroglio" (Editorial page, September 1, 2009) said that Justice Kannan of the Madras High Court voluntarily disclosed his assets. Justice Kannan was appointed to the Madras High Court but later transferred to the Punjab and Haryana High Court.

10

Judicial Appointments and Norms

This article was published in the Hindu on 23 September, 2009 in relation to the controversial proposed appointment of Justice P.D. Dinakaran to the Supreme Court. There was widespread opposition from the members of the Bar, distinguished retired judges and members of the public. The article argues that while deciding the suitability of a judge the correct test was an assessment of his reputation for integrity and not the institution of an inquiry into whether the judge lacked honesty or integrity. In view of adverse public opinion a motion for Justice Dinakaran's removal under Article 124(4) was moved in the Rajya Sabha and an Inquiry Committee under the Judges Inquiry Act, 1968 was constituted. During the course of the proceedings of the committee Justice Dinakaran, who was then serving as Chief Justice of the Sikkim High Court, resigned on 29 July, 2011.

Meanwhile, Justice Dinakaran challenged the appointment of a member of the Inquiry Committee on the ground of bias which was rejected by the Supreme Court. However, the court (G.S. Singhvi J and Asok Kumar Ganguly J) asked the Vice-President of India to reconstitute the Committee after dropping the concerned member.

The controversy relating to the proposed appointment of Justice P.D. Dinakaran to the Supreme Court is unique and unprecedented. The citizen is entitled to be informed about the many issues that have arisen.

The procedure and process of appointment of Judges of the High Courts and the Supreme Court has been the subject matter of three judgments of the Supreme Court.

The first one [Justice P.N. Bhagwati in *S.P. Gupta v. Union of India*, AIR 1982 SC 149: (1981) Supp SCC 87] has picturesquely described this process:

"The exercise of the power of appointment and transfer remains a sacred ritual whose mystery is confined only to a handful of high priests, namely... The mystique of this process is kept secret and confidential between just a few individuals, not more than two or four as the case

may be, and the possibility cannot therefore be ruled out that howsoever highly placed may be these individuals, the process may on occasions result in making of wrong appointments and transfers and may also at times, though fortunately very rare, lend itself to nepotism, political as well as personal and even trade-off."

This judgment has been overturned only on two points. First, primacy is now given to the opinion of the CJI and not the Central government. Secondly, in view of the wider consultation required, judicial review is excluded except where the requisite consultation is not done or the appointee is ineligible.

Yet, the mystique of the "Sacred Ritual" remains, with certain changes introduced by two subsequent judgments of the Supreme Court *SCAORA v. Union of India*, AIR 1994 SC 268: (1993) 4 SCC 441 and *Presidential Special Reference No. 1 of 1998*. Both these are nine-Judge Bench judgments. The first change is that the circle of "high priests" has been enlarged to include some senior judges in different collegiums, and a wider consultation amongst knowledgeable judges is taking place. Secondly, the substantial exclusion of judicial review makes the process virtually non-transparent and unaccountable. What was opaque has now become total darkness.

Has this exercise gone awry in the case of Justice Paul Daniel Dinakaran Premkumar?

On August 28, *The Hindu* came out with the news that the Supreme Court collegium had recommended five names for elevation to the Supreme Court. These were of A.K. Patnaik (the Chief Justice of the Madhya Pradesh High Court), T.S. Thakur (Chief Justice: Punjab and Haryana), K.S. Radhakrishnan (Chief Justice: Gujarat), S.S. Nijjar (Chief Justice: Calcutta) and P.D. Dinakaran (Chief Justice: Karnataka).

On September 8, the Chief Justice of India and the collegium as well as the Law Minister were informed by a few senior members of the Bar by means of letters that "we have got very disturbing reports about the integrity of one of the proposed appointees from multiple reliable sources." (The author of this article was a co-signatory.)

On the same day the letter was followed by a communication enclosing a representation from several responsible members of the Tamil Nadu Bar with detailed facts and particulars. The President of India and the Prime Minister were apprised of the situation. A second representation by members of the Tamil Nadu Bar with additional facts has now been communicated to the authorities concerned.

Upon the news breaking in the print and electronic media the Karnataka Bar Association passed a resolution calling upon Justice Dinakaran to refrain from discharging judicial duties. Justice Dinakaran stoutly denied the allegations and any wrongdoing.

Issues Mixed Up

In view of the demand made by the Karnataka Bar Association, two issues have got mixed up and this is confusing the public mind.

The first is regarding the suitability of a candidate to be appointed as a Judge of the High Court or the Supreme Court. The second is whether the allegations and complaints against the Judge are to be inquired into and findings arrived at, and for what purpose? The mechanism and the tests for arriving at an opinion on these two issues are entirely different.

This article only deals with the first issue.

In the celebrated case of *S.P. Gupta v. Union of India*, Justice Bhagwati was called upon to deal with a similar issue. Justice S.N. Kumar was appointed an Additional Judge of the Delhi High Court for two years and the question arose whether he should be recommended for further extension as an Additional Judge. The then Chief Justice of India (Justice Y.V. Chandrachud) recommended him for further extension. But the then Chief Justice of the Delhi High Court (Justice Prakash Narain) wrote to the Law Minister that he was not in a position to recommend such extension for Justice Kumar. His reasons included several complaints and also the fact that some responsible members of the Bar and some of his colleagues had expressed doubts about Justice Kumar's integrity. The Chief Justice of the Delhi High Court frankly stated that he had no investigating agency to conclusively find out whether the complaints against Justice Kumar were genuine or not. But he added that "all the same, the complaints have been persistent." The Law Minister, accepting the views of Chief Justice of the Delhi High Court, did not give an extension to Justice Kumar.

On a challenge to this decision, Justice Bhagwati discussed the entire record of relevant correspondence between the Law Minister and the Chief Justice of India and the Chief Justice of the Delhi High Court, and observed: "While making his recommendations whether S.N. Kumar should be continued as an Additional Judge or not, the Chief Justice of Delhi had to consider the fitness and suitability of S.N. Kumar at the time... and doubts about the integrity of S.N. Kumar were expressed by responsible members of the Bar and some of his own colleagues, the Chief Justice of Delhi could not be said to have acted unreasonably in declining to recommend S.N. Kumar for an extension. It may be that on full and detailed investigation through an independent and efficient investigative machinery, the complaints and the doubts against S.N. Kumar might have been found to be unjustified but such a course would have been neither practicable nor desirable."

The contention urged on behalf of Justice Kumar was that the question to be addressed was whether in fact the judge possessed honesty and integrity and not whether the judge enjoyed a good reputation for honesty and integrity. This argument was rejected.

It was held that while arriving at his opinion on suitability the matter was not required to be adjudicated or a quasi-judicial or judicial inquiry to be held to find out whether the Additional Judge was in fact lacking in honesty and integrity.

It was observed (by Justice Bhagwati):

"Such an inquiry against a Judge whether additional or permanent would not be permissible except in a proceeding for his removal. What

the Chief Justice of the High Court has to do is merely to assess the suitability of the Additional Judge for further appointment and where lack of integrity is alleged against him, the assessment can only be on the basis of his reputation for integrity.”...

“It is therefore not enough in order to be able to recommend a person for appointment as a Judge to say that there is no proof of lack of integrity against him, because, if such were the test to be applied, there would be grave danger of persons lacking in integrity being appointed as Judges. The test which must be applied for the purposes of assessing the suitability of a person for appointment as a Judge must be whether the Chief Justice of the High Court or for the matter of that, any other constitutional authority concerned in the appointment, is satisfied about the integrity of the person under consideration... The public injury which may be caused by appointment of a Judge lacking in integrity would be infinitely more than the public injury which may result from non-appointment of a competent Judge possessing integrity.”

No Inquiry Necessary

In sum, to make an appointment no inquiry into allegations is necessary. What is essential is that the constitutional functionaries have to be satisfied about the appointee’s integrity. In other words, as Justice Verma put it pithily, “The collective wisdom of the constitutional functionaries involved in the process of appointing superior Judges is expected to ensure that persons of unimpeachable integrity alone are appointed to these high offices and no doubtful persons gain entry.”

11

Judicial Integrity – Lessons from the Past

This article was published in the Hindu on 21 October, 2009.

*It deals with the controversy arising from the proposed
appointment of Justice P.D. Dinakaran to
the Supreme Court of India.*

*The article points out the course adopted by Chief Justice
of India Sabyasachi Mukharji in connection with the controversy
and impeachment of Justice V. Ramaswami of the Supreme Court
in 1990. The article raises the question of Justice Dinakaran
being permitted to discharge judicial functions in spite of
serious allegations. This question, which remains unanswered,
depends on the leadership of each Chief Justice of India.*

“A single dishonest judge not only dishonours himself and disgraces his office but jeopardises the integrity of the entire judicial system” said our Supreme Court.

In our country, the Supreme Court and the High Courts have set very high standards in protecting the citizen’s rights, the freedom of speech and expression, the rule of law, the independence of judiciary and judicial review. The Indian judiciary has earned and won international accolades. Its achievements are second to none. Every citizen, every judge and every lawyer owes it to the country and to future generations that this lustre is not dimmed, this reputation is not tarnished, this bulwark of freedom is not undermined or weakened.

When citizens and lawyers make complaints against the functioning of judges, it is because they want to preserve this vital institution in our democracy.

The Justice Dinakaran controversy is ‘snowballing’ and is diminishing the image of the judiciary with every passing hour. National dailies have been reporting various news items. Some of the headlines run — “Dinakaran elevation put on hold” (*The Hindu*, 11.10.2009); “TN report may nail Dinakaran” (*The Times of India*, 11.10.2009); “Dinakaran row: Panel may ask Govt. to consider others” (*The Indian Express*, 11.10.2009); “Supreme Court studies secret report on Dinakaran” (*The Times of India*, 11.10.2009); “Dinakaran move to SC held up” (*The Asian Age*, 12.10.2009); “Government to take possession of Judge land” (*The Asian Age*, 12.10.2009); “Charges pile up against Dinakaran” (*Hindustan Times*,

13.10.2009); and “TN farmers now add to Dinakaran’s woes” (*The Indian Express*, 13.10.2009).

The informed citizen is inquiring — what is happening? What are the decisions of the Collegium? Why the delay in appointing four other State Chief Justices to the Supreme Court — all senior to Justice Dinakaran? Why is Justice Dinakaran being permitted to sit and discharge judicial functions in spite of serious allegations being looked into? Even though over a month has expired there is no press release, official statement or information officially given or emanating from the Supreme Court.

In contrast, it is interesting to recall the sequence of events that took place in the case of Justice V. Ramaswami in the 1990s when he was a sitting judge of the Supreme Court. In the beginning of May 1990, reports started circulating about various questionable acts of Justice Ramaswami when he was the Chief Justice of the Punjab and Haryana High Court. There were reports submitted by the Internal Audit Cell of the High Court, a report by the District and Sessions Judge (Vigilance), reports and audit queries from the Accountant General’s Office.

The then Attorney-General of India, Soli J. Sorabjee, and the president of the Supreme Court Bar Association, K.K. Venugopal, and other leaders of the Bar met Chief Justice of India Sabyasachi Mukharji and drew attention to these reports. On July 20, 1990, CJI Mukharji, when some of us were present in Court, got up a few minutes earlier and announced that he would come back to make a statement. He did so after 4 pm. His statement was widely published and is part of the Supreme Court record.

After referring to the reports circulating about Justice V. Ramaswami, his statement to the Bar, in open Court contained the following: “This was an unprecedented and an embarrassing situation. It called for caution and establishment of a salutary convention.” ... “The Supreme Court must uphold the rule of law. It is, therefore, necessary that those who uphold the rule of law must live by law and judges must, therefore, be obliged to live according to law.” ... “We must, therefore, ensure that there is no conduct of the judges which affects the faith of the people that judges live according to law.”

... “I was constrained, in those circumstances, to advise Brother Ramaswami to desist from discharging judicial functions so long as the investigations continued and his name was cleared on this aspect.” ... “Since I had assured the learned Attorney General, the Law Minister, the president of the Bar Association and others that I will look into it, I thought I must convey to you the result of my looking into it.”

Justice Ramaswami went on leave.

The sequel to Justice Ramaswami’s case needs to be recalled. On August 29, 1990, CJI Mukharji constituted a Committee of three judges — Justice Ray, Justice Shetty and Justice Venkatachaliah and sought their advice as to whether Justice Ramaswami should sit in Court. Unfortunately, CJI Mukharji died prematurely on September 25, 1990, and the matter took a different turn under the leadership of Chief Justice Ranganath Misra who was appointed CJI on October 6, 1990. The Committee of three judges made its report on November 6, 1990, saying it did

not see any ground of moral turpitude which would prevent Justice Ramaswami from discharging his duty as a judge. The Committee made clear that "This exercise is not to sit in judgment over the conduct of Justice Ramaswami, much less to engage ourselves in any exercise to ascertain whether his conduct is blame-worthy in any manner."

Thereupon, Justice V. Ramaswami started discharging his judicial duties. But my recollection is that at the request of the Bar, the Court agreed that advocates who did not want their matters taken up by him could request listing before another Bench.

The Lok Sabha Speaker, on an impeachment motion, appointed a Committee consisting of Justice P.B. Sawant of the Supreme Court, Justice P.D. Desai, Sitting Chief Justice of Bombay, and O. Chinnappa Reddy, a former judge of the Supreme Court. The Committee in its report gave adverse findings opining that the acts constituted "misbehaviour".

The rest is history. The ruling party under the leadership of Prime Minister Narasimha Rao abstained from voting and the impeachment motion failed. (196 for the motion, none against, 205 abstentions).

In the Justice Dinakaran matter, after September 8, 2009, several representations with facts and documents containing serious allegations have been sent to the collegium by responsible lawyers regarding the appointment of Justice P.D. Dinakaran.

There is no sharing of information by the Supreme Court collegium with the public or the Bar, no official statement, no press release. Rumour and speculation are having a field day. It is said "there is nothing busier than an idle rumour."

In Justice Ramaswami's case, the statement made by CJI Mukharji in open court set a precedent and should be regarded as a healthy convention. What is the way forward? First, if the representations made to the collegium are of sufficient gravity, surely the precedent by which Justice Mukharji requested Justice V. Ramaswami to go on leave is worthy of emulation. Secondly, the way forward would be to take the public, the legal fraternity and the media into confidence by regular official releases or press statements issued under the authority of the Supreme Court collegiums. Thirdly, before the snowball turns into an avalanche, it is important to know whether his appointment is going forward or not.

The wise words used by the three Judges Committee in the Ramaswami case need to be recalled: "A judge's morals are not the standards of the marketplace but are the "punctilio" of a higher code.

... "There has, indeed, been a growing sense of cynicism and concern in public mind about the fall in the standards of judicial conduct and of the wisdom of such constitutional immunity for judicial improprieties from public scrutiny and censure.

... "Today, the incantation of maxims of high judicial morality has few takers; acceptable precept is acceptable example alone. Sunlight is, perhaps, the best disinfectant."

12

Judicial Appointments — Agenda for Reform

This article was published in the Hindu on 17 December, 2009. It deals with the unsatisfactory collegium system of judicial appointments and refers to the old UK system, which was called an “Old Boy Network” and a “self-perpetuating body of cronies”. The new procedure under the UK’s Constitutional Reforms Act, 2005 invites applications and mandates interviews. The South African Constitutional Appointment and Complaints system is also discussed highlighting the fact that the potential candidate is interviewed and questioned openly in the presence of the media. The article advocates an open, transparent, merit-based system.

The former Chief Justice of India, P.B. Gajendragadkar, said: “Wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach and by the restraint, dignity and decorum which they observe in their judicial conduct.”

The bottom line is “deserve respect from the public at large.” The prestige of the Supreme Court has never been lower except during the Emergency of 1975-77 and in the aftermath of the Habeas Corpus judgment. The higher judiciary is suffering from self-inflicted wounds. The Dinakaran appointment controversy has been dragging on from September 9, 2009. To appoint or not to appoint? — the question remains unanswered.

It is ironical that over 70 members of the Rajya Sabha have donned the mantle of leadership and decided to present an impeachment motion against the Chief Justice of the Karnataka High Court in record time. One hopes Parliament will deliberate and decide impartially — judicial integrity is too crucial to be tested through the prism of partisan politics.

The entry point at which High Court judges are appointed has to be guarded meticulously. Indifferent and unsuitable appointments create many difficulties because most of the Supreme Court judges are drawn from among senior judges of the High Courts.

Supreme Court Collegium

The system of appointments and transfers was the subject matter of many judgments until a nine-judge Bench gave “primacy” to the opinion of the CJI after wide consultations with senior colleagues in the Supreme Court collegium.

The collegium experiment is not working satisfactorily. Justice V.R. Krishna Iyer’s views encapsulate the public perception (*The Hindu*, Dec. 2, 2009): “What is wrong with our courts that they have lost their credibility and prestige? Corruption has crept in ... Another great deficiency is that a collegium that is untrained in the task selects judges in secret and bizarre fashion. There could be room for nepotism, communalism and favouritism in the absence of guidelines... The collegium is a disaster: the P.D. Dinakaran episode is an example. A new code by a constitutional chapter has become an imperative.”

We must introduce radical reforms for a better tomorrow and discard systems which have outlived their utility. The need of the hour is to remove the lack of transparency and secrecy and replace the existing system with an independent, permanent, well-informed Judicial Appointments Commission functioning openly and transparently. This will require a constitutional amendment. The time is ripe for the same.

U.K.: The Old System

Till 2006, judicial appointments were made by the Lord Chancellor and steeped in secrecy. Over a period of time, this system came under grave criticism. Colin Turpin writes: “Lord Scarman has described the appointment process as “all too haphazard” and an “old boy network” which has resulted in some terrible mistakes.”

John Alder comments, “Traditionally the Lord Chancellor privately consults judges and other senior lawyers and the senior judges ... This process creates the risk that the judiciary is regarded as a self perpetuating body of cronies.”

Constitutional Reform Act, 2005

Radical reforms have been brought about in the U.K. by the Constitutional Reforms Act, 2005. A new Constitutional Court was established and it has started functioning. A Judicial Appointments Commission (JAC) is now in place with Baroness Usha Prashar as Chairperson — a distinguished civil servant of East African Indian origin. It has 14 other Commissioners including five judicial members, one barrister, one solicitor, five lay members, one tribunal chairman and one lay judge. The Chairperson and 12 Commissioners are appointed through open competition, while the other three are selected by the Judge’s Council. The selection of judges is to be solely on merit and the Act provides, “A person must not be selected unless the selecting body is satisfied that he has a good character” (Clause 63).

Applications are invited through advertisements for appointments to the High Court. The Act also provides for a Judicial Appointments and Conduct Ombudsman but that is not the theme of this article.

There are separate selection processes for posts of judges of the Supreme Court, Lord Chief Justice and Heads of Divisions, and puisne judges of High Courts. The process of selection to the High Court is done by the JAC, a body with a majority of non-judicial members representing a cross-section of society and the profession. Thus, inputs on a potential candidate and his integrity would be available from a wide spectrum of society. After inviting applications, interviews are taken and a rigorous and intrusive method of inquiry is in place. In Lord Falconer's words, the methodology is "robust and transparent."

South Africa

The Constitution, the Judicial Service Commission (JSC) Act and the JSC Amendment Act, 2008 deal with appointments and complaints against the higher judiciary. The amendment to the JSC Act has not been brought into force but it deals exhaustively with complaints against judges, a topic not relevant to this article.

The Constitutional Court is headed by the Chief Justice and has a Deputy Chief Justice. The Supreme Court of Appeal is headed by a President with a deputy. The head of the Executive is the President of South Africa. The President makes appointments to these four positions after consulting the JSC and leaders of the parties in the National Assembly.

The JSC consists of the Chief Justice, who presides over it as Chairperson, the President of the Supreme Court of Appeal, one Judge President designated by the Judge's President and the rest non-judicial members. State High Court appointments are made by including in the JSC the Judge President of that Court and the State Premier. The total strength of the JSC is the Chief Justice plus 22 or 24 members. Judicial members do not have a preponderant voice.

The procedure of the JSC for other appointments to the Constitutional Court is gazetted. A vacancy or potential vacancy is publicly announced, nominations are called for and these must contain *inter alia* detailed curriculum vitae and answers to a questionnaire. The Commission interviews the shortlisted candidates and such sessions are open to the public and the media. After the interviews, the Commission holds deliberations in public and selects the candidates for recommendation. The Chairperson and the Deputy Chairperson shall "distil and record the Commission's reasons" for recommending the candidate selected. The Commission advises the President on the names of the candidates and the reasons for their recommendation. The names are publicly announced. A similar procedure is followed for appointments to the State High Courts.

If a young republic like South Africa can function in such an open, transparent and professional manner — predominantly involving laypersons — why can't India adopt a similar procedure?

We are at a defining moment — the independence of the judiciary and the rule of law will be severely compromised if the integrity of the higher judiciary is not protected by an independent, informed, transparent, fair and robust process. "The collegium" experiment needs to be jettisoned. Every adversity creates an opportunity. When there is a "duty to speak," it is for responsible lawyers,

citizens, former judges, and sitting judges to speak out — publicly or privately — and create public opinion and internal “peer pressure”.

Parliament, a proactive Law Minister, retired judges, and responsible members of the Bar must campaign to safeguard the independence and integrity of the judiciary.

13

A Trojan Horse at the Judiciary's Door

This article was published in the Hindu on 14th June, 2013.

The United Progressive Alliance (UPA) government, inspite of request in 2013 by Senior Lawyers, did not respond or make public the Constitution Amendment Bill and the Judicial Appointments Commission Bill. The Constitution (120th Amendment) Bill (later corrected as Constitution (99th Amendment) Bill) and Judicial Appointments Commission Bill were gazetted and tabled in the Rajya Sabha on 29th August, 2013 and passed by the Rajya Sabha on 5th September, 2013 by 131 votes in favour and 1 vote in opposition. The BJP which was in Opposition walked out of the Rajya Sabha. The Bill was never moved in the Lok Sabha before the general elections.

After the general elections in May, 2014, the National Democratic Alliance (NDA) formed the government. The Constitution (99th Amendment) Act was passed in both Houses with the requisite majorities fully supported by the Opposition and ratified by the States. Simultaneously, the National Judicial Appointments Commission (NJAC Act) was also passed and both received Presidential Assent on 31st December, 2014.

The Supreme Court Advocates-on-Record Association (SCAORA) and the Bar Association of India led the attack on the validity of the 99th Constitution Amendment and the NJAC Act. A Constitution Bench invalidated the Constitutional Amendment as being violative of the basic structure and the NJAC Act as unconstitutional by a judgment dated 16th October, 2015 (4 against 1). A Review against the same was also dismissed on 1st March, 2016.

"Even so, the creed of judicial independence is our constitutional 'religion' and, if the executive use Article 222 to imperil this basic tenet, the Court must 'do or die'"
— Justice Krishna Iyer

A recent proposal for a Judicial Appointments Commission as structured by the government poses a grave threat to the independence of the judiciary. According to media reports, the Commission is likely to consist of seven members — the Chief Justice of India and two senior-most judges of the Supreme Court, the Law Minister, two eminent jurists nominated by the President, and the Leader of the Opposition. If past experience is a guide, eminent jurists enjoying or aspiring to enjoy political power, or beguiled by official patronage, have displayed little warmth and much hostility to the independence of the judiciary and the rule of law. The present proposal will require a constitutional amendment.

Draft Bill

In April 2013, media reports indicated that the government was contemplating reform proposals regarding appointment of judges to the Supreme Court and the High Courts. A draft Bill by the Law Ministry then headed by Ashwani Kumar was to submit the Judicial Appointments Commission Bill to the Cabinet by April 22.

On April 15, 2013, a letter signed by many senior lawyers (including Fali Nariman, M.N. Krishnamani, Shanti Bhushan, Ashok Desai, K.K. Venugopal, P.P. Rao, K.N. Bhat, Mukul Rohtagi and the author) was sent to the Law Minister, requesting him to make available to the public and the Bar the draft of the proposed Bill to ensure a robust, informed and critical debate. The plea fell on deaf ears and the draft Bill remains a well-guarded secret.

In the first week of June, the new Law Minister, Kabil Sibal, is reported to have said: "Just as judges have enormous stake in the appointment of judicial officers in the higher judiciary [the Supreme Court and the 24 High Courts], the government has an equal stake. Since both of us have stakes in the appointments of members of the higher judiciary, the consultation of both of them is absolutely necessary. The government must have a say." (*The Hindu*, June 2, 2013)

The Collegium System

This article deals only with the government proposal. It does not deal with how to reform the collegium system. The principal criticism against the collegium system is that it is non-transparent; personal likes and dislikes and prejudices weigh with individual judges in the collegium; the mandatory effective consultation process is wholly opaque and unknown to the public; and meritorious candidates from the Bar and the High Courts are overlooked for undisclosed reasons. It must be highlighted that the collegium system has not attracted any significant criticism that political favourites or pliant judges have been appointed.

Supreme Court Judgment

The current appointment mechanism is the result of two judgments of the Supreme Court viz *Presidential Reference No. 1* of 1998 (unanimous) and SCAORA

v. *UOI* (seven against two). The two judgments overruled in part the majority view in *S.P. Gupta v. UOI* by holding that in case of a difference of opinion, the CJI's view as reflected through the collegium would have primacy over the view of the Central government. The concern of the judgments was to eliminate political interference at the stage of appointment. The court observed that "it was obvious that the provision of consultation with the Chief Justice of India ... was introduced ... to eliminate political influence even at the stage of the initial appointment of a judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary."

The judgments laid down a mandatory consultation process between the constitutional authorities, including the Central government which has inputs from various intelligence agencies. The complaint that the Central government is not consulted or has no say in the matter is misleading and incorrect.

Current Scenario

The government is upset because the executive does not now have the primacy it enjoyed earlier. The vigorous judicial scrutiny and oversight of executive misdemeanours in the 2G scam and Coalgate litigations (apart from many others) has rattled the executive. The present administration is smarting under these decisions and has been consistently attacking all constitutional authorities such as the Comptroller and Auditor-General, the Chief Election Commission and the judiciary which acts as a check on executive power.

Historical Background

For the new generation of citizens, it is necessary to recall the experience of the past resulting in the collegium mechanism. Congress administrations have been in power for over 52 of the last 63 years of constitutional governance. Consistent attempts have been made to undermine and subvert the independence of the judiciary and the rule of law.

On April 25, 1973, a day after the delivery of the judgment in the Fundamental Rights case (*Kesavananda Bharati*), the Indira Gandhi government, departing from earlier conventions, superseded three of the senior-most judges (who had decided against the government) and appointed A.N. Ray as Chief Justice of India. Justice Ray had decided three major cases in favour of the Central government — though in the minority — namely the *Bank Nationalisation* case, the *Privy Purse* case and the *Kesavananda Bharati* case. The government stand was to appoint "forward looking" judges who shared its philosophy — a euphemism for compliant judges.

This led to vigorous public protests all over India. J.C. Shah (former CJI), M.C. Setalvad, C.K. Dapthary (two former Attorney-Generals) M.C. Chagla (former Chief Justice of Bombay), V.M. Tarkunde, (former judge of the Bombay High Court), K.T. Desai (former Chief Justice of Gujarat) and N.A. Palkhivala condemned the supersession as a grave threat to judicial independence.

After the declaration of Internal Emergency in June 1975 (as a sequel to the disqualification of Indira Gandhi who lost her election petition and could not obtain a complete stay from the Supreme Court), a calibrated, predetermined attack on judicial independence was organised and implemented. Mass transfers

of 16 independent High Court judges, including A.P. Sen, Chinnappa Reddy, B.J. Divan, Sankalchand Sheth, J.R. Vimadalal and P.M. Mukhi, from their parent High Courts were made. Additional Judge U.R. Lalit was not confirmed. Justice S. Rangarajan was transferred to Sikkim because he delivered a judgment in favour of Kuldeep Nayar (preventively detained) and a Service Judge R.N. Aggarwal who concurred was reverted as a Sessions Judge (after four years in the Delhi High Court). These were all punitive measures to intimidate independent and fearless judges and undermine their morale.

During the Emergency, the Constitution was extensively amended. Judicial review was almost eliminated and a two-third majority of judges was mandated for invalidating legislation. The press was censored and Opposition leaders were preventively detained without trial.

After the fall of the Janata government, Indira Gandhi came back to power in 1980. Law Minister Shiv Shankar issued a circular claiming power to transfer High Court judges and attempted to transfer some existing judges and refused to confirm some additional judges. This led to the famous case of *S.P. Gupta v. UOI* in which, by a majority, the Supreme Court held that in case of a difference of opinion, the government view would have primacy over the view of the Chief Justice of India on appointments and transfers.

Post-1980 (till the evolution of the collegium mechanism), many quipped: “Better to know the Law Minister than the law.” It was widely believed that the executive was blocking appointments recommended by the CJI unless its nominees were cleared by a trade-off. Further, it was the perception of many that favourable orders could be obtained by the executive from compliant judges for dubious considerations.

Failed System

The collegium system is now current since 1993 (a span of about 20 years) and several criticisms and shortcomings have surfaced as mentioned above. Reform of the above system is necessary but that should not be brought about by restoring a failed system which posed a threat to the independence of the judiciary and the rule of law.

The Judicial Appointments Commission is so structured as to revive the dominant voice of the political class by including the Law Minister, two eminent jurists nominated by the government and the Leader of the Opposition.

In sum, with all its shortcomings, the present collegium system is definitely superior to the earlier one. The attempt to restore the predominant voice of the political class in judicial appointments and transfers will amount to subverting the basic structure of the Constitution and will be a recipe for disaster. Each one of us must strongly resist this attempt.

The present proposal is a poisoned chalice, an ill-concealed wolf in sheep's clothing.

To conclude, I quote the venerable Justice Krishna Iyer — ‘hands off judges’ is too sacred to be sacrificed.

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Upholding Judicial Independence

This article was published in the Hindu on 7th December, 2013. The United Progressive Alliance (UPA) government, in spite of request in 2013 by Senior Lawyers, did not respond or make public the Constitution Amendment Bill and the Judicial Appointments Commission Bill. The Constitution (120th Amendment) Bill (later corrected as Constitution (99th Amendment) Bill) and Judicial Appointments Commission Bill were gazetted and tabled in the Rajya Sabha on 29th August, 2013 and passed by the Rajya Sabha on 5th September, 2013 by 131 votes in favour and 1 vote in opposition. The BJP which was in Opposition walked out of the Rajya Sabha. The Bill was never moved in the Lok Sabha before the general elections.

After the general elections in May, 2014, the National Democratic Alliance (NDA) formed the government. The Constitution (99th Amendment) Act was passed in both Houses with the requisite majorities fully supported by the Opposition and ratified by the States. Simultaneously, the National Judicial Appointments Commission (NJAC Act) was also passed and both received Presidential Assent on 31st December, 2014.

The Supreme Court Advocates-on-Record Association (SCAORA) and the Bar Association of India led the attack on the validity of the 99th Constitution Amendment and the NJAC Act. A Constitution Bench invalidated the Constitutional Amendment as being violative of the basic structure and the NJAC Act as unconstitutional by a judgment dated 16th October, 2015 (4 against 1). A Review against the same was also dismissed on 1st March, 2016.

The provisions of the Constitution (120th Amendment) Bill later corrected as the Constitution (99th Amendment) Bill read with the Judicial Appointments Commission Bill, 2013 (JAC Bill), if adopted, will emasculate an independent judiciary and will pose a grave threat to the rule of law. The Constitution

Amendment having been passed by the Rajya Sabha on September 5, 2013 is coming up before the Lok Sabha in the winter session.

Our Supreme Court has said “[the] Rule of Law is a basic feature of the Constitution which permeates the whole of the constitutional fabric and is an integral part of the constitutional structure. The independence of the judiciary is an essential attribute of the Rule of Law.”

The court has also observed: “In India, however, the judicial institutions, by tradition, have an avowed apolitical commitment and the assurance of a non-political complexion of the judiciary cannot be divorced from the process of appointments. ... The constitutional values cannot be whittled down by calling the appointment of judges an executive act.”

The doctrine of separation of powers cannot be stretched so as to set up a mechanism which is capable of being abused by making judicial appointments completely subservient to the will of the executive.

Pernicious Features

First, the composition of the JAC is the Chief Justice of India (CJI), two senior-most judges of the Supreme Court, the Law Minister, and two eminent persons selected by a panel consisting of the Prime Minister, the CJI and the Leader of the Opposition in the Lok Sabha. It can be modified or altered by Parliament by ordinary law (Article 124A). This configuration of six members is not part of the Constitution and is not constitutionally entrenched. The JAC can be ‘packed’ by pliant elements in future by the executive even by an Ordinance and the JAC can recommend non-meritorious persons even on the basis of caste, religion or loyalty to the government.

The appointment of the CJI, the CJ of High Courts, and judges of the Supreme Court and the High Courts and transfer of High Court judges are to take place on the recommendation of the JAC. Thus, a JAC can, even by a majority, recommend a junior judge of the Supreme Court to be a CJI — or even a Chief Justice or judge of the High Court can be recommended to be the CJI. Further, with six members as contemplated in the JAC, a casting vote for the CJI is essential.

Secondly, there is no provision recognising the convention that the senior-most Supreme Court judge will be appointed as the CJI (unless physically impaired) — a constitutional convention adhered to from 1950 except for the two supersessions concerning Justice A.N. Ray and Justice M.H. Beg. Such a provision will prevent lobbying and will preserve collegiality in the apex court.

Thirdly, the JAC Bill provides that the Central government will appoint the officers and employees of the Commission, making its secretariat a government department. This is the most dangerous provision. The officials and personnel of the Commission should be appointed in the same manner as those of the Supreme Court (Article 146), viz. by the CJI or such other judge or officer of the court as he may direct. If the secretariat or officers and servants of the JAC are treated as government departments, there are a hundred ways of making the JAC dysfunctional. In addition, the confidentiality and secrecy of the JAC

deliberations cannot be maintained. The importance of an independent secretariat is a *sine qua non* for an independent and politically neutral JAC.

Fourthly, all expenses including salaries, allowances and pensions should be charged upon the Consolidated Fund of India as provided for the Supreme Court and the High Courts (Article 146 and 229). The JAC must be financially independent of executive budgetary control.

Finally and, most importantly, the criticism against the collegium system was lack of transparency, no consultations with the Bar, favouritism, the lack of a level-playing field for meritorious members of the Bar, no list of potential candidates prepared after advertisements and nominations to be put up in the public domain and lack of guidelines and criteria in the selection process. These core concepts must be incorporated in the Constitution Amendment and not left to be addressed by the Central government or the JAC. One opaque collegium need not be substituted by another, raising the apprehension that future vacancies may be shared by internal accommodations within the JAC.

The above pernicious shortcomings are ticking time-bombs which can be detonated at any time by a powerful executive having a parliamentary majority in the future — and we are looking at a future which may extend to many years.

If these flaws are removed and appropriate ancillary provisions are made in the Constitution Amendment Bill itself, the entire judicial reform can be part of the Constitution and the JAC Bill will become wholly redundant.

It is worth recalling that the provisions of the Bills were never communicated to the Bar for a robust debate, in spite of a written request by leading members of the Bar in April 2013. The two Bills were gazetted and tabled in the Rajya Sabha on August 29, 2013. On September 5, 2013, the Constitution Amendment Bill was passed in the Rajya Sabha by 131 votes in favour and a single vote by Ram Jethamalani in opposition. The JAC Bill has been referred to a parliamentary committee. This great hurry reminds one of the amendments passed during the Internal Emergency — the 39th Amendment moved on August 6, 1975, and passed on August 8, 1975; the 40th Amendment moved on May 18, 1976, and passed on May 27, 1976; the 41st Amendment moved on August 18, 1976 and passed on August 30, 1976; the 42nd Amendment moved on August 28, 1976, and passed on November 11, 1976.

Reactions to the Bill

The views of former CJI M.N. Venkatachaliah (who headed the National Commission to Review the Working of the Constitution) as reported mention that it would be dangerous if the primacy of the CJI in the appointment process was done away with — it would be against the basic structure of the Constitution. Two other former CJIs are reported to have strong reservations about the JAC being altered by a simple majority and even somebody other than the CJI being made chairperson of the JAC (*Indian Express*, September 6, 2013).

If the Bills in the present form are passed without eliminating the pernicious features, a serious constitutional challenge is likely to be mounted on the ground

of violation of the basic structure by undermining an independent judiciary and consequently the rule of law. These are not imaginary fears. Who expected constitutional amendments which effectively emasculated judicial review being passed during the Internal Emergency after detaining all Opposition leaders, gagging the press and controlling the media and intimidating High Court judges by punitive transfers?

Modus Vivendi: Possible Consensus

Is a consensus possible? Dr. Rajendra Prasad in his speech in the Constituent Assembly on the eve of the adoption of the Constitution said: "We have prepared a democratic Constitution. But a successful working of democratic institutions requires in those who have to work them willingness to respect the viewpoints of others, capacity for compromise and accommodation. ... After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them..."

The Law Minister in his speech delivered in Hindi in the Rajya Sabha on September 5, 2013, said that Parliament had great respect for the judiciary and that the independence of the judiciary should not be impaired. There seems to be some rethinking by the government in regard to the composition of the JAC being entrenched in the Constitution.

It is a unanimously held view that the rule of law and the independence of the judiciary should in no manner be compromised. It is widely perceived that the collegium system has not worked well and requires extensive reforms.

If the amendment is passed with the pernicious flaws indicated above, it is likely to create enormous tensions between the Bar and the judiciary on the one side and the executive on the other — a bruising confrontation which could well be avoided before the coming general elections.

It is hoped that our political leadership will rise to a level of statesmanship to give substance to the prophetic words of Rajendra Prasad, and bring judicial reforms while preserving the rule of law supported by an independent judiciary.

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Making Judiciary More Transparent

This article was published in the Hindu on 4th August, 2014. The United Progressive Alliance (UPA) government, inspite of request in 2013 by Senior Lawyers, did not respond or make public the Constitution Amendment Bill and the Judicial Appointments Commission Bill. The Constitution (120th Amendment) Bill (later corrected as Constitution (99th Amendment) Bill) and Judicial Appointments Commission Bill were gazetted and tabled in the Rajya Sabha on 29th August, 2013 and passed by the Rajya Sabha on 5th September, 2013 by 131 votes in favour and 1 vote in opposition. The BJP which was in Opposition walked out of the Rajya Sabha. The Bill was never moved in the Lok Sabha before the general elections.

After the general elections in May, 2014, the National Democratic Alliance (NDA) formed the government. The Constitution (99th Amendment) Act was passed in both Houses with the requisite majorities fully supported by the Opposition and ratified by the States. Simultaneously, the National Judicial Appointments Commission (NJAC Act) was also passed and both received Presidential Assent on 31st December, 2014.

The Supreme Court Advocates-on-Record Association (SCAORA) and the Bar Association of India led the attack on the validity of the 99th Constitution Amendment and the NJAC Act. A Constitution Bench invalidated the Constitutional Amendment as being violative of the basic structure and the NJAC Act as unconstitutional by a judgment dated 16th October, 2015 (4 against 1). A Review against the same was also dismissed on 1st March, 2016.

The question of judicial appointments has reached centre stage. The new government has started a process of consultation in relation to two Bills — the Constitution Amendment Bill and the Judicial Appointments Commission Bill.

The bills were an attempt by the previous government to take over judicial appointments. First, the composition of the Judicial Appointments Commission (JAC) can be modified by Parliament by ordinary law. Second, the independence and impartiality of the proposed JAC will be undermined by the JAC Secretariat being made a department of government. Third, the expenses and salaries, etc of the JAC would not be charged to the Consolidated Fund of India and will be dependent on budgetary control by the Executive.

The Supreme Court and the High courts have their independent registries, where appointments are made by or at the direction of Chief Justices (Article 146 and Article 229 respectively), ensuring total freedom from political interference and political domination.

Collegium System

The Constitution Amendment Bill was in the public domain only for a few days, notwithstanding demands by stakeholders for an early disclosure. After a very brief debate on September 5, 2013, the Constitution (120th Amendment) Bill (later corrected as 99th Amendment Bill) was passed by the Rajya Sabha after the Bharatiya Janata Party (BJP) walked out. The BJP's demand was that the Parliamentary Standing Committee should examine both the Bills together. Then BJP MP (and now the Union Minister for Law and Justice), Ravi Shankar Prasad is reported to have said in the Rajya Sabha: "Home work was not done. We were misled into passing it ... The Minister [Kapil Sibal] has committed a mistake, he should feel sorry for his act. Law minister should apologise to the House. He must apologise, anguish would not do."

There is a broad perception among most stakeholders that the present collegium system has not performed well and needs radical change. The worrying concerns relate to: appointment of unsuitable candidates and selection based on favouritism and nepotism, influential connections and personal likes and dislikes. There appears to be a consensus that the composition of the proposed JAC should be entrenched in the Constitution and cast in stone and that the pre-1993 position and the primacy of the Executive should not be restored — a view shared by two Ministers involved in the recent consultation process.

The debate raises many important questions — whether the JAC should be a permanent body with permanent members and a fixed tenure, rather than one with *ex officio* holders of judicial office who are all birds of passage with a limited tenure; whether the convention that the senior-most Supreme Court Judge be appointed Chief Justice of India (CJI) should be disregarded; whether the judiciary should have a dominant voice, and whether there should be a veto for dissenting members against the judicial members.

The two Bills being debated do not address the issue of a lack of transparency in the appointment procedure and of non-disclosure of reasons for selection.

Need for Openness

The focus of this article is only on openness and transparency in the appointment procedure and on the necessity of providing relevant principles and guidelines in the Constitutional Amendment Bill.

All democracies are swiftly moving toward an open government and a citizen's right to know — an international trend increasingly being supported by judicial decisions.

Further, the right to know is part of the freedom of speech and expression and the present secretive system, as implemented by the collegium, violates this fundamental right.

Publicity, the Soul of Justice

The principle of open justice and public trial is essential for the fair administration of justice. In the celebrated case of *Scott v. Scott*, observations by the 19th century philosopher Jeremy Bentham were quoted: "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the judge himself while trying under trial." and "The security of securities is publicity."

Our Supreme Court cited, with approval, this passage in the *Naresh Sridhar Mirajkar* case and added that "... a trial held, subject to the public scrutiny and gaze, naturally acts as a check against judicial caprice or vagaries ..."

The distinguished former president of the Supreme Court of Israel, Aharon Barak, in his book, *The Judge in a Democracy*, observed: "... But we are judges. We demand that others act according to the law. This is also the demand that we make of ourselves"

"I view my office as a mission. Judging is not a job. It is a way of life. Whenever I enter the courtroom, I do so with the deep sense that, as I sit at trial, I stand on trial."

Justice Sabyasachi Mukherjee, during the controversy regarding the impeachment of Justice V. Ramaswami, stated: "... The Supreme Court must uphold the rule of law. It is, therefore, necessary that those who uphold the rule of law must live by law and Judges must, therefore, be obliged to live according to law"

Why should this salutary principle not apply to the process of judicial appointments? "In camera" trials are ordered where the parties and witnesses require protection or a fair trial is prejudiced. In the functioning of the JAC or any other machinery for judicial appointments, no litigating parties are involved and the potential candidates who voluntarily participate must agree to an open and transparent process.

The present secretive process followed by the collegium excludes public scrutiny, violates the citizen's right to know and leads to diminishing respect for the judiciary.

The observations in the First Judges Case (*S.P. Gupta v. Union of India*), which have not been overruled on this point, support the concept of openness. Bhagwati J. — with whom five judges agreed — while overruling the claim of privilege for non-disclosure of communications relating to appointments and

transfers of judges, observed: "The citizens' right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the government is increasingly growing in different parts of the world."

He further observed: "Now, if the secrecy were to be observed in the functioning of government and the processes of government were to be kept hidden from public scrutiny, it would tend to promote and encourage oppression, corruption and misuse or abuse of authority, for it would all be shrouded in the veil of secrecy without any public accountability."

"We believe in an open government and openness in government does not mean openness merely in the functioning of the executive arms of the state. The same openness must characterise the functioning of the judicial apparatus including judicial appointments and transfers."

To ensure openness and transparency, the proposed constitutional amendment must embody some key principles and core concepts for guidance and implementation by the JAC. These would include: transparent criteria for eligibility as well as for shortlisting and selection (like age, standing, income, etc); a complete and periodically updated database of potential candidates that includes their qualification, performance, general reputation, etc and which is accessible to the public; applications to be invited by nomination/advertisement; consultation with members of the Bar and Bar organisations; inputs sought from the public with regard to shortlisted candidates; absolute immunity to citizens, while giving their inputs in a confidential manner, from laws of contempt and defamation; reasons for selection to be recorded and disclosed when required, and, most importantly, a complete record of video/audio of JAC deliberations.

Informed Debate

In sum, one does not want a differently constituted appointing authority operating in secrecy.

Lord Steyn in the House of Lords observed: "The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny ... Informed public debate is necessary about all such matters ... It promotes the value of the rule of law."

Surely, a judiciary which considers the rule of law a part of its basic structure must abandon the culture of secrecy that envelops the present appointment process.

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The Government vs. The Supreme Court

*This was the first published article by the author in a print media.
Sunday Standard Magazine published it on 28th June, 1981
(a supplement of Indian Express.)*

The month of June not infrequently brings sensational news – news which changes the country's destiny or deflects the course of events. On June 1, 1973, comes the news of Mohan Kumaramangalam's death in an air crash. In June 1975 the Allahabad High Court delivers judgment in Mrs. Indira Gandhi's election case which triggers off the Emergency. In June 1980, the Pitts aircraft crash results in Sanjay Gandhi's death. And in June 1981, the central government refuses to extend the tenure of two Additional Judges of the Delhi High Court for a short period. It also refuses to disclose its reasons to the Supreme Court at its vacation sitting.

The vacation judge, Justice V.D. Tulzapurkar, passed a balanced order stating that a *prima facie* case had been made that the decision not to extend their term was *mala fide* and unconstitutional. He went on to observe that this *prima facie* inference was strengthened by three factors. First, that arrears of work in the Delhi High Court were mounting for which Additional Judges were necessary; secondly, the Chief Justice of India and the Chief Justice of Delhi had recommended the extension of the term of all the three judges; and thirdly, Justice S.B. Wad, the juniormost amongst the three judges when appointed, was given an extension by one year.

The whole question of the validity of the law minister's circular issued last March, demanding undertakings from Additional Judges regarding transfers, will be heard some time after the reopening of the courts in July 1981. Meanwhile the battle lines have been drawn and the storm clouds are gathering. The government seems to be spoiling for a fight. The crisis is of the gravest character and should not be underestimated. The Executive has decided to have a confrontation with the Judiciary - eyeball to eyeball.

What is meant by the 'independence of the judiciary?' What is its importance and why is it necessary? What is the record of the present government? What have been the assaults on the judiciary? What is the immediate danger? These are some of the questions that spring to one's mind and require answers.

Every politician swears by an Independent judiciary, though in private and when in power, most swear at it. It is a mantra, like 'democracy'. One may have not only a constitutional democracy but also a people's democracy or a non-party democracy or even a democratic dictatorship.

A man is detained without trial or charges because his competitor has pull with a high officer or a minister. A businessman's license is taken away because he has refused to contribute to an election fund. A landlord wrongly throws out a tenant with the help of the police. Where does the citizen go? Only to a Judge who is independent. 'Independent' of whom and of what? The answer is obviously independent of the Executive, that is one completely free of any influence or intimidation by any limb of the executive government, whether it be a police officer or a secretary or a powerful minister.

This principle is well recognised in our Constitution. That is why judges cannot be removed by government till superannuation, nor can their salaries be reduced during office, Law and arbitrary power are sworn enemies. If the validity of arbitrary executive action is to be judged it can only be done by an Independent referee.

The whole point of the confrontation today in India is that powerful politicians want to be above the law. They want to sit in court by proxy through a pliant and submissive judiciary.

The pattern of cases reaching the courts in the fifties and at the present time has changed. On the decision of an election case hinges the career of a powerful politician. In a case involving graft or other improprieties, a political future may be reduced to naught. How comforting then to have a compliant judge:

Attacks on the Judiciary

The first concerted and major attempt to overawe the judiciary was undoubtedly the first supersession in April 1973, a day after the historic judgement in Kesavananda Bharati's (the fundamental rights) case. (The Supreme Court ruled in this case that it was not open to Parliament, even by a constitutional amendment, to alter or destroy the basic structure of the Constitution.) Justice A.N. Ray was appointed Chief Justice of India superseding three of his senior colleagues - Justices J.M. Shelat, K.S. Hegde and A.N. Grover. This was unprecedented and in violation of an unbroken practice of 23 years. Though the then Law Minister H.R. Gokhale tried to defend the appointment on grounds of merit and by using the Law Commission's recommendations torn out of context, the real reason came out in the debate in Parliament during the defence of the government by the late Mohan Kumaramangalam, the former Steel Minister. He said that the government was entitled to select as Chief Justice a person who was forward-looking and whose philosophy and outlook it approved of. Here was a clear case of the Executive superseding judges whom it did not approve of and promoting those it did.

Justice A.N. Ray (In his dissents) had decided the bank nationalisation case, the privy purse case and the fundamental rights case in favour of the government. A litigant (the state) was asserting its right to choose a referee of whom it approved. Mr. Kumaramangalam further said that Justice Ray had

been appointed to end a six-year-old confrontation between Parliament and the Supreme Court. The reference was obviously to *Golak Nath's* case decided in 1967, the bank nationalisation case in 1970 and the privy purse case in 1970. (The ruling Congress party's reaction to *Golak Nath* was subdued. It was only after the Congress split in 1969 that populism took command and the judiciary came under attack.)

These were all cases where the government lost. But they were also cases where the decisions were linked to enforcement of the fundamental right to property. The situation now is qualitatively different. There is now no fundamental right to property which was deleted by the 44th Amendment during the Janata administration. Thus, no social reform legislation promoting social justice can be nullified by the courts in defence of property rights. In fact, no legislation of that type has been invalidated by the Supreme Court in recent years.

The supersession was almost universally condemned by the legal fraternity except by politically committed lawyers, Mr. M. Hidayatullah (the present Vice-President of India and a former Chief Justice of India) pithily said that if such appointments are made, the men who will be chosen "will not be 'forward looking' but looking forward" and that "some judge would want to trim his opinions so as to be able to get on."

The Emergency

The second period during which the judiciary was sought to be subdued starts with the fateful judgement of the Allahabad High Court on June 12, 1975, unseating and disqualifying the then Prime Minister, Mrs. Gandhi. Justice Krishna Iyer on June 24, 1975, refused an unconditional stay to the then Prime Minister and on the midnight of June 25, 1975, the internal Emergency was declared. Till the middle of January 1977, when the Lok Sabha was dissolved, there was a concerted and calculated attempt to clip the powers of the Judiciary and to bring in sweeping constitutional amendments. The object, was, once and for all, to destroy the checks and balances and the power of judicial review. Coupled with this was the attempt to terrorize by transfers independent High Court judges and to weed out additional judges who had fallen foul of the Executive.

A quick overview is instructive. A former Chief Minister of West Bengal stated before the Shah Commission that on June 25, 1975 (when the imposition of the internal Emergency was being decided) at the then Prime Minister's house, there was talk of locking up the High Courts and cutting off electricity connections to all newspapers.

In August 1975, the Constitution 39th Amendment Act was passed in three days' time to oust the jurisdiction of the Supreme Court to decide the appeal in the Prime Minister's election case (Article 329A (4)). The Supreme Court struck down the ouster clause applying the ruling in the fundamental rights case.

In November 1975, a bench of 13 judges was constituted by Chief Justice Ray to reconsider the fundamental rights case in an effort to see that no constitutional amendment could be struck down as invalid even though it was contrary to the basic structure. The effort ended in a fiasco and a dissolution of the Bench

resulted after two days' arguments. The sense of the majority of Judges seemed to be not to reconsider the fundamental rights case.

In January 1976, U.R. Lalit, an additional Judge of the Bombay High Court, was not continued. In February 1976, R.N. Aggarwal, an Additional Judge of the Delhi High Court, was not continued and was reverted to his post of a District Judge. The former had delivered a Judgement criticizing the administration while granting bail to certain students during the Emergency. The latter had been a member of the Bench which delivered a judgement nullifying a preventive detention order passed against Kuldip Nayar, a well-known journalist.

In May 1976, 16 judges of the High Courts were transferred without their consent to other High Courts. This was unprecedented and widely interpreted as a move to punish and terrorize independent judges. An intrepid soul amongst them (Sankalchand Sheth of the Gujarat High Court) challenged his transfer as *malafide*.

A full Bench of the Gujarat High Court struck it down during the Emergency. After the Janata administration came to power, the Supreme Court dealt with this case and was of the view that the transfer was invalid. Justice P.N. Bhagwati (one of the judges) had this to say in his judgement:

"It is indeed strange that the Government of India should have selected for transfer, by and large, those High Court Judges who had decided cases against the Government during the Emergency..... But unfortunately, the Government of India adopted a high and mighty attitude..... and that does lend credibility to the argument that the transfer was not made in the public interest but was by way of punishment with a view to bringing pressure on High Court judges to fall in line with the views of the Government."

He added: "What is done once, if allowed, may be done again." He also approved a perceptive observation that: "Judges are more often bribed by their ambitions and loyalty than by money."

During 1975, a paper was circulated by the Law Ministry not only suggesting a presidential form of government, but a Superior Council of the Judiciary to interpret the Constitution and to supervise the performance of judges.

In April 1976, came the habeas corpus judgement extinguishing the last hope for the citizen. Emboldened by this decision, the government went on the offensive. The Swaran Singh Committee recommended large scale amendments to the Constitution.

The Law Minister Gokhale mounted a campaign of denigration against the judiciary and introduced the Bill which became the 42nd Constitutional Amendment. The Bill provided that no Constitutional Amendment could be struck down as Invalid by the Judiciary. Mr. Gokhale said: "If even after this warning is given again things like this recur I think it is a bad day for the judiciary of this country." And further: ". . . They should realise further that there is something more supreme than the Supreme Court itself and that is Parliament." He warned the judges against any confrontation with the government.

The 42nd Amendment considerably circumscribed the powers of the courts to strike down legislation. During the Janata administration much of the mischief of the 42nd Amendment was nullified by the 44th Amendment. In the *Minerva Mills* case, decided last year, the Supreme Court applied the ruling in the fundamental rights case and declared as void that part of the 42nd Amendment which purported to take away the court's power to adjudge upon the validity of a constitutional amendment. The Supreme Court also struck down as invalid a provision in the 42nd amendment which gave primacy to directive principles over fundamental rights. In January 1977, Justice Khanna was punished for his dissent in the habeas corpus case and was superseded by M.H. Beg who became Chief Justice.

The Janata administration substantially nullified the 42nd Amendment. It retransferred High Court judges who wanted to go back to their parent High Courts. There was no major confrontation with the judiciary during this brief interlude.

January 1980 and After

HARDLY had the new government been formed, when events started moving swiftly. In January 1980, the Law Minister, Shiv Shankar, stated that "the Judiciary continues to be a vestige of British imperialism and it should be reorganized." In June 1980, he wanted one-third of the judges of the High Courts from outside the State and wanted to strictly enforce Article 222 which confers on the President the power to transfer judges in consultation with the Chief Justice. He claimed that the government could transfer High Court judges without their consent and pressed into service the views of a Parliamentary Consultative Committee attached to his ministry. He, however, stated that the manner and mode of transfers could be left to the Chief Justice of India.

However, there is no word of condemnation for the mass transfers during the Emergency. The government refused to appoint permanent Chief Justices as vacancies occurred, but only made acting appointments. Even these orders were delayed till the last moment and the incumbents were kept in suspense. By August 1980, five High Courts had only Acting Chief Justices (Andhra, Assam, Jammu and Kashmir, Delhi and Rajasthan). Simultaneously, the Law Minister adopted the device of only giving short extensions of three to four months to Additional Judges, contrary to the usual practice of giving them extensions of two years at a time until their appointments as permanent judges, which was done as a matter of course.

Meanwhile, the Chief Justice of India, supported by all his colleagues, set his face against mass policy transfer. The Vice-President, Mr. Hidayatullah, was publicly critical of large-scale transfer. Justice Krishna Iyer repeatedly criticized the policy of mass transfers.

The firm stand of the Chief Justice of India, clearly supported by the law laid down by the Supreme Court in *Sheth's* case, had a salutary effect. By January 1981, four Acting Chief Justices were confirmed as permanent Chief Justices (Bombay, Delhi, Orissa and Rajasthan). The Law Commission in its 80th Report (prepared under the chairmanship of Justice H.R. Khanna) was not against one-third of

the judges of the High Court being from outside the state. It recommended, however, that this should be done by the process of initial appointments and not by transfer.

On the involuntary transfer of judges, it is worthwhile recalling the views of Mr. Frank Anthony, an MP nominated by the Government, expressed in the Lok Sabha as far back as April 30, 1963 during the debate on the Constitution (15th Amendment) Bill:

“Then what is going to happen with regard to this question of transfer? . . . Two evil consequences are going to flow. Either the judges who want a transfer will go around deliberately currying favour with the political powers that be, or the independent judges will be brought to heel because they refused to accept the dictates of the political powers that be, and they will be — as a penal sort of measure — transferred out of their home States. That is going to happen. Judges privately have told me that this is an extremely pernicious provision the right to transfer has been given there and it is bound to be used as an instrument of political terror, an instrument in order to demoralise the Judiciary.”

These words proved prophetic and the mass transfers actually made during the Emergency had the effect of creating a demoralising atmosphere.

Meanwhile, the Chief Minister of Maharashtra (A.R. Antulay) had mounted his own campaign. Having acknowledged that he had circulated the note during the Emergency in 1975 advocating the presidential form of Government, he said in a press interview as follows:

In a Parliamentary system the Judiciary has a secondary role; it has to be subservient to Parliament. You can't have a Judiciary being more powerful than Parliament;" and again:

"And certainly all those who sit in the Judiciary are not angels! They were lawyers taking fat fees, doing all sorts of things — sometimes even misleading the Court. And suddenly they become judges - do they become saintly overnight?" He was asked: "Shouldn't we be careful about making sweeping statements, don't we bring the Judiciary into disrepute?"

His answer was unequivocal: "I don't think so. When all these fellows in Court (in the case in which Mr. Antulay was accused of contempt) ridicule the Executive, do you mean to say that they are promoting the growth of healthy democratic traditions in this country? They go about speaking in a manner that no decent person would do. You send somebody to the Courts - I'll give you the names of the judges."

But more important is what the Prime Minister is reported to have said to her party members. She said that the Janata and Marxist Governments had appointed several political activists to High Courts throughout the country. "Can we expect justice from those who are so closely connected with the Janata and the Marxist Governments?"

She asked: "If they continued, how can we expect justice from them? What is their credibility?"

This view is patently incorrect. All appointments to the High Courts have been made in consultation and with the concurrence of the Chief Justice of India and the Chief Justices of the states. Further, both the present Chief Justice of India and most of the Chief Justices in the High Courts were originally appointed to their respective courts by Congress governments and have reached the Chief Justiceship on the principle of seniority. The threats and denigration contained in these remarks are brazen, direct and unfortunate.

There is no question of any confrontation. After the deletion of 'property' as a fundamental right, legislation can be struck down as void principally because of violation of the fundamental right to personal liberty (Art. 21) or because of discrimination (Art 14) or violation of minority rights or religious rights. In fact, the Supreme Court has struck down no important legislation in or after 1980. In the *Minerva Mills* case, the hearing of which was concluded during the Janata regime, the right of the Court to annul Constitutional amendments contrary to the basic structure has been reaffirmed and applied.

Immediate Future

The pattern of attack on the judiciary is twofold. First, to claim an unlimited power to amend the Constitution. That has failed for the present. The theory of the basic structure is firmly entrenched in our legal thinking. Surely a republic cannot be altered into a dynastic monarchy. Nor can free elections with multiparty candidates be converted into an election with one-party candidates. The tenure of the present Chief Justice of India is till 1983. One sees no immediate prospects of the basic structure theory being jettisoned.

The second line of attack is to unnerve the judiciary. The idea is to drive out and to turn away the independent judge and to make it impossible for independent members of the Bar to accept judgeships. That explains the circular of the law minister and the highly intimidating and objectionable manner in which extensions are being granted. This, therefore, is where the battle has been joined.

Whatever might be the views of the present politicians, it is inspiring to recall the thoughts of the first prime minister of our country, Jawaharlal Nehru, during the debates in the Constituent Assembly (May 24, 1949). He said: "It is important that these Judges should not only be first rate but should be acknowledged to be first rate in the country and of the highest integrity, if necessary, people who can stand up against the executive government and whoever may come in their way."

Each citizen and Judge must decide whether he will walk with Nehru or not.

It has been well said that England owes her constitutional liberties far more to her wicked than to her righteous monarchs. One hopes that the greater the assaults on our judiciary, the stronger it will become.

Fundamental Rights – Human Rights

17

Emergency Powers and the Indian Constitution

This article briefly summarises how most of the damage done by Constitutional amendments during the Internal Emergency was substantially undone by the Constitution 44th Amendment brought by the Janata government. This article, which first appeared in Venkat Iyer (ed), Democracy, Human Rights and the Rule of Law: Essays in Honour of Nani Palkhivala (Butterworths India, New Delhi, 2000), is reproduced with the permission of LexisNexis, A Division of Reed Elsevier India Private Limited, formerly known as Butterworths India.

Introduction

The Internal Emergency declared under controversial circumstances by the Prime Minister, Mrs. Indira Gandhi on 25 June, 1975, which lasted until 21 March, 1977, was a traumatic experience. Indian democratic institutions were subverted and came within a hair's-breadth of being permanently undermined. However, by a combination of fortuitous circumstances, democracy and freedom were eventually restored. This essay attempts to recount the events of those two eventful years.

Ironically, Nani Palkhivala played a key role in events leading up to the emergency. In the sixties and early seventies, Palkhivala's name was associated with the great legal battles concerning fundamental rights. He was a living legend amongst the legal fraternity and many thinking citizens. Some of the cases argued by Palkhivala created enormous tension between the executive, led by Mrs. Gandhi, and the judiciary. Matters came to a head following the Supreme Court's judgment in the famous Fundamental Rights case,¹ in which the court, by a majority of seven to six, invalidated a portion of the Constitution (25th Amendment) Act, and held that Parliament had no power to effect any change to the Constitution which would alter its basic structure. Chief Justice Sikri, who presided over the Bench, retired on 25th April, 1973, a day after that judgment had been delivered. On that day, the three senior-most judges of the court (who had decided against the Government) were passed over for the

1. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461: (1973) 4 SCC 225.

office of Chief Justice, in violation of the unbroken convention then prevailing of the senior-most judge being appointed to that office. The fourth senior-most judge, Mr. Justice A.N. Ray, who had decided in favour of the Government, was instead chosen for the office. This led to vigorous protests all over India and Palkhivala organized a public meeting in Bombay at which some of the most distinguished lawyers and public figures unequivocally condemned the 'supersession' as subversive of the independence of the judiciary.

On 12 June, 1975, Indira Gandhi lost an important election case before the Allahabad High Court. This court ruled that she was guilty of corrupt electoral practices and had forfeited her right to sit as a Member of Parliament. It also disqualified her from holding any elected office for a period of six years. She turned to Nani Palkhivala to present an appeal against this decision before the Vacation Judge of the Supreme Court. Palkhivala was asked to obtain an unconditional stay of the operation of the judgment. It is a great tribute to Palkhivala's stature as a lawyer that he was sought out by Mrs. Gandhi, notwithstanding his public and staunch opposition to many of the decisions of her Government. Palkhivala made a strong plea on her behalf for a full stay, arguing that, 'the nation was solidly behind her as Prime Minister and that there were momentous consequences, disastrous to the country, if anything less than the total suspension of the orders under appeal were made'. This plea was rejected by the Judge, Justice Krishna Iyer, who, following well settled precedents, granted only a conditional stay on 24 June, 1975.² This disabled Mrs. Gandhi from either voting or speaking as a member of the Lok Sabha (The Lower House of Parliament), although she could attend Parliament and participate in its proceedings as Prime Minister. She had thus become an ineffective and tainted Prime Minister.

On the night of 25 June, 1975, Mrs. Gandhi, acting on advice from some of her closest confidants, instructed the President, for the first time in independent India's history, to declare a state of Emergency on the grounds that the security of India had been threatened by 'internal disturbance'.³ She also simultaneously ordered the detention, in a midnight swoop, of all the prominent Opposition leaders in and outside Parliament under legislation which permitted preventive detention, *i.e.*, detention without trial.⁴ The persons detained included Jayprakash Narayan, a respected socialist elder statesman, and Morarji Desai, a prominent Opposition leader who had held several important offices of State and who succeeded her as Prime Minister.

Ironically Palkhivala's argument before the Court that the consequences of not granting an unconditional stay of the Allahabad High Court judgment would be disastrous for the country came true - albeit in a manner neither the country nor Palkhivala could have foreseen! To his eternal credit, however, Palkhivala at once resigned as counsel for Indira Gandhi.

2. *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 1590: (1975) 2 SCC 159: (1976) 2 SCR 347.

3. Such a proclamation could be made under the terms of Article 352 of the Constitution, as it then stood.

4. Most of the detention were carried out under the Maintenance of Internal Security Act, or the Defence of India Act, 1971.

Later, in November 1975, Palkhivala was to appear before a Bench of 13 Judges of the Supreme Court which was suddenly constituted by Chief Justice Ray (the beneficiary of the supersession) to seek to overrule the Fundamental Right's case—a move obviously triggered by a demand from the executive branch of Government. Palkhivala opened the case for the citizens, and for two days made an impassioned plea that no ground had been made out for reconsidering the case. The impact of his argument was so great on most of the other Judges that after two days of the proceedings, Chief Justice Ray was compelled to quietly dissolve the Bench on 12 November, 1975. Justice H.R. Khanna who was a member of that Bench, recalls in his autobiography that

“In one of the most impassioned addresses he [Palkhivala] said that no case had been made for reconsideration of the matter, more particularly at the [a] time when [the] Emergency was in full force. He added that there could be at such time no full discussion nor full reporting of the arguments. He also challenged the press to report what he said in Court.

My feeling and that of some of my colleagues was that the height of eloquence to which Palkhivala rose on that day had seldom been equalled and never [been] surpassed in the history of the Supreme Court.”⁵

It would be a matter of fascinating research for a future historian to find out whether there was, on record, any judicial order or application on the basis of which the Full Bench of 13 Judges was constituted. As far as is known, there was no order by which the Bench was dissolved.

As one perceptive observer lightheartedly remarked, both Palkhivala and Justice Krishna Iyer unwittingly contributed to the imposition of the 1975 Emergency!

The Emergency Provisions – Constitutional Background

Before dealing with the experience of the use of emergency powers, it would be interesting to refer to the debates on the emergency provisions that took place in the Constituent Assembly prior to the framing of the Constitution.

In the draft Constitution prepared by the Constitutional Adviser for the benefit of the Assembly, the emergency provisions were contained in Part XI (draft Articles 275 to 280, which corresponded to the present Articles 352 to 359). When they were first debated on 2 August, 1949, they provoked strong sentiments from several members who thought they represented an unacceptable assault on civil liberties. One such member, H. V. Kamath, attacked the draft Articles in the following words:

“I find no parallel to this Chapter of Emergency Provisions in any of the other Constitutions of democratic countries in the world. The closest approximation to my mind is reached in the Weimar Constitution of the Third Reich which was destroyed by Hitler, taking advantage of the very same provisions contained in that Constitution....

It has been recognized by students of politics that the very provisions in the Weimar Constitution ... contributed to the rise of Herr Hitler and paved the way

5. H.R. Khanna, *Neither Roses Nor Thorns*, Eastern Book Co., Lucknow, 1985, at 74-75.

to [sic] his dictatorship. Compared to that Article 48 of the Weimar Constitution, the provisions we are making under Chapter XI are far more drastic We should alter and revise this Chapter so as to see that the liberties guaranteed in this Constitution are real.

“Let us remember that a Constitution can be subverted not merely by agitators, rebels and revolutionaries *but also by people in office, by people in power.*”⁶

He urged that the fundamental rights themselves contained sufficient limitations to safeguard the public interest during an emergency, and that any further curtailment of them was unnecessary.

Another member, Professor Shibban Lal Saxena, suggested an amendment which would provide that any suspension of fundamental rights would be by Parliament and not by the executive.⁷

Yet another member, Mahavir Tyagi was no less trenchant in his criticism of draft Article 280 (which corresponded to the present Articles 359);

The only guarantee that the people have against the high-handedness of their State is the court. And so if in our enthusiasm we empower the State and they go beyond the judiciary and override it, there will remain nothing but the law of the jungle. For the present type of democracy in India, people do not count at all. Their only privilege is that they have a free access to the judiciary... If the people were to be told that the State is supreme in India and that the Supreme Court is liable to be overridden, they will lose confidence of their security and existence. With an independent judiciary it is not only the people who draw a sense of security against the tyranny of the State but even an individual feels confident about himself, whenever his rights and privileges come in clash with the vagaries of society.

“...Even if the whole State pounces on him, he has one guarantee as a citizen of the land to approach the Supreme Court for protection and relief I submit, Sir, that the principle involved in the article under discussion is very pernicious. I, for one, cannot vote for it. Even if the whole House agrees to arm the government with such powers, even in the case of emergency, I, for one, wish to bring it on record that I am opposed to this now and ever (Hear! Hear!)... And having in view the poor training of political parties in their practice of democracy, I am inclined to profess that we should not be surprised if individuals are ordered to be hanged for flimsy reasons of their not seeing eye to eye with the powers that be. All this will be done in the name of Emergency.”⁸

Concern was also voiced over the same article by Professor K.T. Shah in the following words:

6. Constituent Assembly Debates [hereinafter ‘CAD’], Vol IX, 105-108 (emphasis supplied).

7. *Ibid*, at 180-185.

8. *Ibid*, at 193.

The moment you introduce a provision like this in our Constitution, the moment you provide that the right to move the Supreme Court which has been guaranteed by a previous article shall be suspended by an Order of the President, by an Order of the Executive, that moment you declare that your entire Constitution is of no effect.⁹

Faced with these strong sentiments, the Chairman of the Drafting Committee, Dr. B R Ambedkar, held over the draft article, but it surfaced again later on and was passed without any substantial amendments that would have met the criticism. H V Kamath wound up the debate on 20 August, 1949 on a note of despondency. He said: 'This is a day of sorrow and shame. May God help the Indian people.'¹⁰ Mr. Kamath's attack on the emergency provisions turned out to be prophetic, as the events of 1975-77 (the Internal Emergency) revealed 25 years later. He said in the debate on 20 August, 1949 in words which suggest that he had powers of prescience bordering on prophecy:

We the Founding Fathers have tried to found the Constitution – on what I would call the 'Grand Affirmation' of fundamental rights. We have tried to build on that the edifice of democracy but I find surmounting that edifice is the arch of the 'Great Negation'. First, the 'Grand Affirmation', then that edifice, at any rate that façade of democracy and surmounting that edifice or façade is the great negation of Part XI, the notorious negation of Part XI, and Article 280 (present Article 359) is to my mind the keystone of this arch of autocratic reaction.

...As an autocratic negation of liberty, this Article takes the palm over all other Constitutions of the World.

... I hope for the good of India for the good of our fellow men and women who have just emerged from the darkness of slavery into the light of freedom, we shall do something for their happiness and *not merely be content with strengthening the hands of a group of people, a tiny coterie or caucus in power.* (emphasis added) That is not the idea which the Father of the nation had in mind.¹¹

It was unfortunate that the warnings given by Mr. Kamath, Shibban Lal Saksena, Prof. K T Shah and Mahavir Tyagi fell on deaf ears and India had to suffer the traumatic experience of that emergency.

The reason why Dr. Ambedkar and others failed to heed those warnings appeared to be the fear of a weak Central authority particularly after the horrendous events surrounding the partition of India. Leaders of stature like Jawaharlal Nehru, Vallabhbhai Patel, C Rajagopalachari and Rajendra Prasad created a sense of confidence that such dire predictions would not come true. Subsequent events have, alas, shown that such confidence was clearly misplaced.

9. Constituent Assembly Debates [hereinafter 'CAD'], Vol IX, at 96 (emphasis supplied).

10. *Ibid*, at 554.

11. *Ibid*, at 533, 535, 537 (emphasis supplied).

The Emergency Powers

The Constitution of India, one of the longest documents of its kind,¹² came into force on 26 January, 1950.¹³ Unlike its counterparts in many Asian, African and South American countries, the Indian Constitution has not been abrogated or jettisoned by revolutionary events such as a military *coup*, or a one-party government, or the absence of free elections. And yet constitutional government and the rule of law have been severely tested in India. During the above-mentioned emergency, there was every danger that the democratic foundations of the Constitution would be permanently subverted. Happily, due to a combination of fortuitous events leading up to March 1977, the ballot-box achieved in India what other nations have had to achieve through civil war, violence or a resort to arms.

Article 352 to Article 360 of the Indian Constitution deal with emergency powers.¹⁴ Broadly speaking, three types of emergency situations were contemplated by the constitutional draftsmen. First, a grave emergency whereby the security of India or any part thereof is threatened by war, external aggression or internal disturbance (Article 352).¹⁵ The effects of such an emergency are laid down in Articles 353, 354, 358 and 359. Secondly, a situation where there is a failure of the constitutional machinery in a State (Article 356), a phenomenon popularly known as imposition of 'President's Rule'. And thirdly a financial emergency, whereby the financial stability or credit of India or any part of its territory is threatened (Article 360). This essay will confine itself to the first type of emergency.

The effects of a Proclamation of Emergency, at the time of the coming into force of the Constitution, were as follows:

- I. Enlargement of the power of parliament to legislate on all subjects, thereby temporarily eclipsing the federal principle;¹⁶
- II. Temporary enlargement of the legislative and executive power of Parliament by automatic suspension of the fundamental right guaranteed by Article 19;¹⁷
- III. Likely suspension of the right to move any court for the enforcement of any of the other fundamental rights, whether in pending or future proceedings;¹⁸

12. It was the longest Constitution in the world until 1974, when that honour was taken away by the then newly-enacted Yugoslavian Constitution).

13. The Preamble to the Constitution and a few other articles had been brought into force earlier (26 November, 1949).

14. These articles have been grouped together under Part XVIII ('Emergency Provisions').

15. By the Constitution 44th Amendment Act, 1978, the words 'internal disturbance' were deleted and the words 'armed rebellion' substituted for them.

16. Article 353(b). Likewise, the power of the Central executive was also enlarged (Article 353(a)).

17. Article 358.

18. Article 359. Under this article, the President (acting under advice from the government) may order such suspension.

It may be noted that, even in an emergency, the executive government was not empowered to interfere with the property or other rights of persons without the authority of enacted law.

The Constitution – Salient Features

To appreciate the emergency powers, a brief overview of the salient features of the Indian Constitution and the structure of Government are essential. First, India is a federal polity, consisting of a union of States.¹⁹ The Federal legislature called Parliament consists of two Houses, the Lok Sabha (the House of the People or the Lower House) and the Rajya Sabha (the Council of States, or the Upper House). Likewise, each of the States has a legislature, though not all of them bi-cameral. Second, the Constitution contemplates the Westminster model of Cabinet Government at both the Federal level and State levels. The President of India is elected by a small number of voters (members of the Federal and State Legislatures) but is a constitutional head and is bound to follow the advice of the Cabinet. Third, there is an independent judiciary, comprising the Supreme Court of India at the federal level and the several High Courts at the State level. The Judges of these Courts are independent of the executive and are not removable except through impeachment. They hold office till superannuation at the age of 65 years in the case of the Supreme Court and 62 years in the case of the High Courts. The higher judiciary has powers of judicial review which can be used to declare any legislation or executive action void *inter alia* on the ground that it violates the fundamental rights guaranteed by the Constitution.²⁰ Laws can also be struck down if they go beyond the legislative powers enumerated in the Constitution.²¹ Fourth, the House of the People and the lower Houses in the States are elected every five years (unless dissolved earlier) by universal adult franchise. The election process is under the direction and control of an independent Election Commission headed by the Chief Election Commissioner, who enjoy the same security of tenure as a Supreme Court Judge.

The First Emergency

The first occasion when the emergency powers were invoked came in 1962, following an armed conflict with China. The Chinese aggression occurred on 8 September, 1962 and a Proclamation of Emergency was issued on 26 October, 1962. That proclamation, under Article 352, declared that a grave emergency existed whereby the security of India was threatened by external aggression. On the same day, the government promulgated a Defence of India Ordinance and the Defence of India Rules. By two other Presidential Orders, both issued under Article 359(1), the fundamental right of any person to move any Court under Articles 14,²² 21²³ and 22,²⁴ were suspended.²⁵ Several individuals were

19. Article 1.

20. (Article 13, read with Article 32 and 226).

21. Sch VII, which defines the respective competences of the Federal and State legislatures to enact laws.

22. The right to equality before the law and the equal protection of laws.

23. The right to life and personal liberty.

24. Protections against arbitrary arrest and detention.

25. The Presidential Order covering Articles 21 and 22 were issued on 3 November 1962, while the one covering Article 14 was issued on 11 November, 1962.

detained without trial under the Defence of India Act and Rules, and the scope for judicial review under those laws soon came up for consideration before the Supreme Court in the leading case of *Makhan Singh v. State of Punjab*.²⁶ This case was heard by a bench of seven Judges, and by a majority judgment, delivered on 2 September, 1963, the court held that:

- I. The Presidential Orders did not affect the jurisdiction of the court but only the enforcement of the named fundamental rights;
- II. The bar on enforcement of fundamental rights would apply to any proceeding, whether in the Supreme Court or in a High Court, and whether it had been brought under Article 226 of the Constitution or under Section 491 of the Criminal Procedure Code;²⁷
- III The bar would apply if, in substance, the petition involved invocation of a fundamental right.

The court, however, clearly stated that a detention order could still be challenged:

"If in challenging the validity of the detention order, the detenu is pleading any right outside the rights specified in the Order, his right to move any court in that behalf is not suspended because it is outside Article 359(1) and consequently outside the Presidential Order itself. Let us take a case where a detenu has been detained in violation of the mandatory provisions of the Act. In such a case, it may be open to the detenu to contend that his detention is illegal for the reason that the mandatory provisions of the Act have been contravened. Such a plea is outside Article 359(1) and the right of the detenu to move for his release on such a ground cannot be affected by the Presidential Order".

The Court expressly ruled that a writ of *habeas corpus* could be moved on the ground that the detention order was *malafide*. It held:

"[I]f *mala fides* are alleged, the detenu cannot be precluded from substantiating his plea on the ground of the bar created by Article 359(1) and the Presidential Order. That is another kind of plea which is outside the purview of Article 359(1)."

Curiously, the petitioner in that case, Makhan Singh, managed to secure his liberty a few days later by successfully appealing, in the Supreme Court, against an order passed against him in Punjab. He had been rearrested and detained on criminal charges even as the earlier order of detention under the Defence of India Act had not been revoked. The Supreme Court Bench, comprising five judges, all of whom had been parties to the first *Makhan Singh* judgment, held that:

"... a double detention is not intended either by section 3(1)(a) or by Rule 30(1)(b) [of the Defence of India Act and Rules, respectively]; it is plainly unnecessary and outside the purview of both provisions."²⁸

26. *Makhan Singh Tarsikka v. State of Punjab*, AIR 1964 SC 381: (1964) 2 SCA 663.

27. This section gave the High Courts powers to issue directions in the nature of *habeas corpus* in cases where the court was of the opinion that a person had been illegally or improperly detained.

28. *Makhan Singh Tarsikka v. State of Punjab*, AIR 1964 SC 1120: (1964) 4 SCR 932.

The order of detention was set aside and Makhan Singh was ordered to be set free. Thus the Court demonstrated that a petition for *habeas corpus* was maintainable even in the face of a Presidential Order, and that it was still possible for relief to be granted to petitioners on grounds of *ultra vires*, independently of any reliance on fundamental rights.

Although the hostilities with China ceased within weeks, the emergency was not revoked. In August 1965, an armed conflict erupted with Pakistan, and the existing state of emergency was pressed into service to deal with it. That conflict, too, ended quite soon, but the government failed to revoke the emergency. It was only after sustained public protests that the emergency was eventually brought to an end on 10 January, 1968.

The Second Emergency

The second occasion for invocation of emergency powers came in December 1971 following the outbreak of fresh hostilities between India and Pakistan arising out of the movement to establish 'Bangladesh'. When Pakistan launched a massive land and air attack on Indian territory on 3 December 1971, the President, acting on instructions from the government, issued a Proclamation of Emergency under Article 352, this time on the grounds that the security of India had been threatened by external aggression.

This emergency also saw the enactment of special legislation in the form of the Defence of India Act, 1971 and Rules, and the use of another law which authorized preventive detention that had been passed a few months previously, viz. the Maintenance of Internal Security Act, 1971 (MISA).²⁹ (The government also, for good measure, later enacted a separate law, the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), to preventively detain alleged economic offenders). Although the special powers were, by and large, invoked fairly responsibly, this emergency saw the detention of tens of thousands of persons, including communist leaders, students, peasants and industrial workers.³⁰ In addition, several thousand prisoners-of-war were also captured and interned during this period.

The hostilities with Pakistan ended on 17 December, 1971, and this was soon followed by diplomatic moves to normalize relations between the two countries, which culminated in a peace accord in July 1972. The Proclamation of Emergency was, however, not revoked, despite increasingly strident calls from Opposition politicians, lawyers, journalists and other public figures. On the contrary, it was, inexplicably, reinforced on 16 November, 1974 by a presidential Order, issued under Article 359, suspending the right of any person who had been detained under the MISA to move the courts for the enforcement of fundamental rights under Articles 14, 21 and 22 of the Constitution.

This emergency also saw some judicial challenges, most of them unsuccessful, to the laws authorizing preventive detention. In *Haradhan Saha v. State of*

29. This Act, a non-emergency piece of legislation, was passed on 2 July, 1971, to replace the Preventive Detention Act 1950 which had lapsed on 31 December, 1969, following the government's inability to muster enough support in Parliament to extend its life.

30. Some 20,000 railway workers were reported to have been detained under the MISA following a strike call by the country's powerful rail unions.

West Bengal,³¹ the Supreme Court refused to accept that the MISA was violative of Articles 14, 19,³² 21 and 22, although the court did not hesitate to grant relief to individuals who had become victims of illegal or over-broad detention orders passed under the Act.³³ In *Khudiram Das v. State of West Bengal*,³⁴ the court rejected another challenge to the MISA, this time based on the argument that the subjective satisfaction of the detaining authority should be amenable to judicial review. The court did, however, recognize that it was within its power to examine the existence, as opposed to the sufficiency, of such satisfaction, and that, where, for example, the detaining authority had not applied his mind at all, the order of detention could be struck down.

The Third Emergency

On 12 June 1975, the then Prime Minister, Indira Gandhi was unseated as a Member of Parliament by the Allahabad High Court following a successful election petition in which she was accused of electoral malpractices. As described above, in a vacation sitting of the Supreme Court in which Mrs. Gandhi was represented by Nani Palkhivala as her counsel, she was only granted a conditional stay against the High Court's order. This stay deprived her of the right to vote or to speak in the Lok Sabha.³⁵

Earlier in the evening of 12 June, the ruling Congress Party was comprehensively defeated at the polls in the State of Gujarat (a previous stronghold of the Congress) and an Opposition coalition government called 'Janata Morcha' had been voted to power.

Faced with these setbacks, Mrs. Gandhi, on the night of 25 June 1975, advised the President to issue another proclamation of Emergency under Article 352 on the grounds that the security of India had been threatened by 'internal disturbance'. This emergency, which lasted until March 1977, was marked by extensive abuse of power and widespread violation of human rights on an unprecedented scale—abuses which were investigated and documented meticulously by an official commission of inquiry headed by a distinguished former Chief Justice of India, Mr. Justice J.C. Shah, soon after the termination of the Emergency.³⁶ Those abuses can conveniently be grouped under three heads:

31. *Haradhan Saha v. State of West Bengal*, AIR 1974 SC 2154: (1975) 1 SCR 778: (1975) 3 SCC 198.
32. The 'seven freedoms' article which guaranteed, to every citizen, the rights to freedom of speech and expression; to assemble peaceably and without arms; to form associations or unions; to move freely within the territory of India; to reside or settle down anywhere in India; to practice any profession or carry on any occupation, trade or business; and to acquire, hold and dispose of property.
33. E.g., in *Ram Bahadur Rai v. State of Bihar*, AIR 1975 SC 223: (1975) 3 SCC 710. the court struck down a detention order which authorized the incarceration of the petitioner on the grounds that he had attended a meeting which decided to launch a 'Gujarat-type agitation' against the government.
34. *Khudiram Das v. State of West Bengal*, AIR 1975 SC 550: (1975) 2 SCC 81.
35. *Indira Nehru Gandhi v. Raj Narain*, AIR 1975 SC 2299: (1976) 2 SCR 347: 1975 Supp SCC 1.
36. Report of the Shah Commission of Inquiry (3 vols), Government of India Press, New Delhi, 1978. Another official report documents the abuses against the mass media: White Paper on Misuse of Mass Media During the Internal Emergency, Government of India, New Delhi, 1977.

- The attack on the Opposition and the Press.
- The assault on the Judiciary
- The subversion of the Constitution

Attack on the Opposition and the Press

As noted earlier, the Emergency saw the arrest and detention of vast numbers of Opposition politicians and anyone deemed 'unfriendly' to Mrs. Gandhi and the ruling Congress party. The Presidential Order suspending the enforcement of several fundamental rights – including the right to life and personal liberty – gave a handle to the government to resist all court actions and to deny the maintainability of petitions for *habeas corpus*. In addition, censorship of a sweeping kind was imposed on the press. Attempts were made to attach and take over independent and fearless newspapers. The Censor tried routinely to block the publication of court judgments which were unfavourable to the government. A new law was passed to prevent the publication of 'objectionable' matter, which included anything defamatory of the Prime Minister, and which authorized the government to impose a wide range of harsh sanctions against those deemed to be violating its provisions.³⁷ The Press Council, which had been established as an independent watchdog in 1965, was abolished,³⁸ and a law allowing fair and accurate reports of parliamentary proceedings to be published without fear of legal sanctions, was repealed.³⁹

Parliament became a rump and far-reaching constitutional amendments and laws were enacted within a few days without any debate in the House or outside.

Assault on the Judiciary

The High Courts, by and large, behaved with fearless independence during the Emergency. Nine of them upheld their right to entertain petitions for *habeas corpus* in the teeth of strenuous arguments to the contrary from government lawyers, with one of the Chief Justices observing that, 'if the arguments of Government were accepted, the ghost of Hitler would stalk the land.' The Delhi High Court struck down an order of preventive detention against a well known journalist, Kuldip Nayar. In another case, the Bombay High Court refused to countenance an order of the city's police Commissioner refusing permission for a private meeting of lawyers wishing to debate the emergency.⁴⁰

However, when the matters were carried to the Supreme Court in appeal, in *ADM Jabalpur v. Shivakant Shukla*,⁴¹ the High Courts were reversed. By a majority of four to one (Khanna J dissenting), the Supreme Court held that the citizen had no remedy against arbitrary detention as *habeas corpus* petitions were not maintainable for as long as the presidential Order suspending the enforcement of fundamental rights remained in force. Lawyers and laymen alike

37. Prevention of Publication of Objectionable Matter Act, 1976.

38. The Press Council (Repeal) Act, 1976.

39. The Parliamentary Proceedings (Protection of Publication) Repeal Act, 1976.

40. *N.P. Nathwani v. Commissioner of Police*, (1976) 78 Bom LR 1.

41. *Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207: (1976) 2 SCC 521.

were shocked: how could the court overrule so many eminent judges of the High Courts? If there was any doubt, surely it should be resolved in favour of the liberty of the citizen. The import of the Supreme Court's ruling was that no one who opposed a dictatorial executive was safe anymore. They could be detained without trial and could be tortured or even killed in the absence of a legal remedy. This judgment was widely criticized. The best indictment of the majority judgment was contained in the dissenting judgment of Justice Khanna who, quoting Friedmann, noted that:

In a purely formal sense ... even the organized mass murders of the Nazi Regime [would] qualify as law ...

What is at stake is the rule of law ... The question is not whether there can be curtailment of personal liberty when there is threat to the security of the State. I have no doubt that there can be such curtailment, even on an extensive scale, in the face of such threat. The question is whether the laws speaking through the authority of the Courts shall be absolutely silenced and rendered mute because of such threat.⁴²

H.M. Seervai, an eminent authority on constitutional law, was scathing in his comments on the *habeas corpus* judgment:

The four judgments were delivered in the darkest hour of India's history after Independence, and they made the darkness complete ... Ordinary men and women could understand Satan saying 'evil be thou my good' but they were bewildered and perplexed to be told by four learned judges of the Supreme Court that, in substance, the founding fathers had written in to the Emergency Provisions of our Constitution, 'Lawlessness be thou our law.'⁴³

In May 1976, the High Court Judiciary was targeted for harassment. One independent Additional Judge of the Bombay High Court, Justice U.R. Lalit, who was due for either an extension or confirmation as a permanent judge, received neither, as a result of which he had to leave his post. Another Additional Judge, Justice Aggarwal, was similarly denied confirmation in the Delhi High Court and had to return to his post as a District Judge. A judge of the Delhi High Court, Rangarajan J, who had granted a writ of *habeas corpus* in the case involving the journalist Kuldip Nayar, was transferred to the Assam High Court, situated in the north-eastern corner of India. Many other independent and fearless judges were similarly punitively transferred. One judge of the Bombay High Court, Justice Mukhi, who had a cardiac condition, asked for a postponement of his transfer to Calcutta, but this request was refused. The judge soon died of shock. Two judges of the Gujarat High Court, Chief Justice B.J. Divan and Justice S.H. Sheth, were transferred to the Andhra Pradesh High Court. One of them, justice Sheth challenged the transfer, and a Full Bench of the Gujarat High Court upheld his challenge. The government took the matter to the Supreme Court by way of an appeal, but before the appeal could be heard, snap general elections were

42. *Ibid*, at 1260, 1268-9.

43. H.M. Seervai, *Constitutional Law of India*, N.M. Tripathi Pvt. Ltd., Bombay, 4th Edn., 1993, Vol. 2, at 2206.

called, in which Mrs. Gandhi and her ruling Congress party were resoundingly defeated, and the Emergency brought to an end.

Attack on the Constitution

The Emergency saw a number of constitutional amendments – some of them involving radical changes – being rushed through Parliament without debate or discussion. Most of the Opposition MPs had been held in preventive detention. Parliamentary proceedings were censored. Even members of the ruling party were under surveillance by intelligence agencies. The rule of law had all but collapsed. The effect of these amendments on the judiciary was as under:

- I. The power of the Supreme Court to decide election disputes was taken away by the insertion of a new Article 329A which conferred that power on such ‘*authority*’ as may be prescribed by parliament. The immediate aim of this amendment was to preempt the Supreme Court from hearing Mrs. Gandhi’s own appeal from the judgment of the Allahabad High Court unseating her as an MP.
- II. The power of judicial review to pronounce upon the validity of statutes was almost completely destroyed by the addition of over 100 Central and State laws to the Ninth Schedule to the Constitution. These laws included not only the dreaded Maintenance of Internal Security Act, 1971 (MISA) – which was mostly used for detaining political opponents, journalists, labour leaders and suppressing all dissent – but also laws which gave sweeping economic powers to the government, including the power to take-over the ownership or management of industrial undertakings. Thus detention without trial and without the safeguard of judicial review, far from being constitutionally prohibited, became constitutionally ‘enshrined’!
- III. The High Courts’ powers of judicial review under Article 226 of the Constitution were severely curtailed, even in cases involving the review of purely administrative orders.
- IV. A novel provision was introduced to the effect that no law could be declared constitutionally invalid by a High Court or the Supreme Court without a two-thirds majority of the judges hearing the case.
- V. The constitutional amendments were themselves put beyond judicial review.
- VI. Judicial review was excluded in respect of laws which purported to provide for the prohibition or control of ‘*anti-national activities*’ or of ‘*anti-national associations*’. These phrases were so vague and nebulous as to be capable of suppressing all political opposition and dissent and to make the courts powerless to safeguard the basic rights of the citizenry.

Alongside these constitutional amendments, changes were also introduced by way of statutory law to adversely affect the power of judicial review. For example,

1. Amendments were made to the Maintenance of Internal Security Act, 1971 (MISA) and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), both dealing with preventive detention, barring the furnishing of grounds for detention, extending the time limits on detention, permitting re-detentions, taking away the power of courts to release detainees on bail or bond, and excluding challenges to detention orders on grounds of natural justice.
2. Far-reaching retroactive amendments were made in the election laws which had the effect of validating the electoral offences committed by Mrs. Gandhi, and these were given immunity from judicial challenge by being included in the Ninth Schedule to the Constitution.

The dominance of the executive was complete. Through these constitutional and statutory changes, Mrs. Gandhi was able effectively to establish a personal dictatorship.

Another constitutional amendment, albeit one which was not carried to fruition, proposed to confer complete immunity against all legal proceedings, civil and legal, on the Prime Minister, the President and State Governors. The Bill containing this amendment⁴⁴ was passed by the Rajya Sabha in August 1975. It sought to insert a new sub-clause in Article 361 as follows:

No criminal proceedings whatsoever against or concerning a person, who is or has been President or the Prime Minister or the Governor of a State shall lie in any Court, or shall be instituted or continued in any Court, in respect of any act done by him, whether before he entered upon his office or during his term of office as President or Prime Minister or Governor of a State, as the case may be, and no process whatsoever including process for arrest or imprisonment shall issue from any Court against such person in respect of any such act.

Other sub-clauses sought to confer immunity from civil proceedings also. However, for reasons which are not clear, the Bill was never moved in the Lok Sabha and it thus never became law. It was nevertheless reminiscent of an attempt to revive the discredited doctrine of the divine right of kings.

However, Mrs. Gandhi was soon to make a grave miscalculation. Based on reports from the intelligence agencies that she continued to enjoy widespread popular support, and overcome by a burning desire to win democratic legitimacy for her actions, particularly outside the country, she ordered snap elections in January 1977. When these elections were held, in March 1977, the results surprised everyone. Both she and her party were soundly defeated and driven out of office. The two emergencies then extant were finally revoked on 21 March, 1977.

The Aftermath

The new government which assumed power made it a high priority to reverse some of the worst excesses of the Emergency. Shortly after taking office, they introduced the Constitution (44th Amendment) Bill for this purpose, which

44. The Constitution (41st) Amendment Bill, 1975.

was passed by the Lok Sabha and the Rajya Sabha the following year. This amendment sought substantially to undo the mischief of the changes made to the Constitution during the Emergency. The powers of judicial review were restored, and the Emergency provisions themselves were tightened up as follows:

1. Article 352 was amended to substitute the words 'armed rebellion' for 'internal disturbance,' so that any future government would have to meet a higher threshold for the declaration of an Emergency.
2. A requirement was introduced in the article that any advice to the President on the issue a Proclamation of Emergency must be in the form of a written communication from the Central Cabinet.
3. A further requirement was introduced that, for a proclamation to remain effective it will need to be approved by a majority of the total membership of each House of Parliament as well as a two-third majority of the members present and voting in each House.
4. Any extension of the Emergency would require further approval by each House of Parliament every six months, failing which the proclamation would lapse.
5. The Lok Sabha could bring an Emergency to an end at any time by passing a resolution to that effect using a simple majority.
6. Article 359 was amended to ensure that the power of the President to issue Orders suspending the enforcement of fundamental rights shall not extend to the rights guaranteed under Articles 21 and 22 (the right to life and liberty and to protection against arbitrary arrest).
7. Article 358 was amended to limit the automatic suspension of Article 19 ('the seven freedoms' article) to emergencies arising out of war or external aggression, and not armed rebellion.
8. Article 22 was amended to introduce certain additional safeguards for those detained under preventive detention laws, including that: (a) the maximum period for which anyone could be so detained without reference to an Advisory Board would be 2 months; (b) all appointments to the Advisory Boards would be made in accordance with the recommendations of the Chief Justice of the appropriate High Court; (c) all members of Advisory Boards would be serving or retired judges of a High Court; and (d) Parliament would no longer have the power to pass laws allowing certain persons to be preventively detained without reference to an Advisory Board.
9. A new article, Article 361A, was inserted to give constitutional protection for the publication of fair and accurate reports of proceedings in Parliament and the State legislatures.

Conclusion

Despite the traumatic events of 1975-77, the lessons of that Emergency have now, alas, almost been forgotten by a vast majority of the Indian citizenry. It

is said that people do not realise the benefits of freedom until they are lost. Twenty-five years have passed and a new generation of Indians is not even aware of what happened during those eventful months.

It is essential that if India is to preserve her democratic freedoms, each generation must be taught, educated and informed about those dark days. Every Indian needs to renew and refresh himself at the springs of freedom.

18

Legal Migration

This speech was prepared and delivered at the LAWASIA Labour Law Conference at Kuala Lumpur, Malaysia held from 10-12 August, 2006. It deals with legal migration, international instruments, the UN Migrant Workers' Convention of 1990, the International Labour Organisation and its instruments and the Indian Supreme Court's judgment invalidating the Illegal Migrants Determination by Tribunal Act, 1983 (IMDT Act). The controversy in relation to Sonia Gandhi's election and the Ayaan Hirsi Ali case – of a Somali migrant who became a Dutch citizen and a member of its parliament – are also mentioned.

I

Introduction

I was delighted to receive an invitation from the organizers to give a luncheon talk on “Legal Migration”. It gave me an opportunity to visit this wonderful country and this friendly city after many years. My last visit was when attending the Commonwealth Law Conference during the Presidency of Dato’ Dr. Cyrus Das. I look forward to renewing friendships and making new ones and interacting with the new generation of Malaysian lawyers.

I recall with affection my interaction with the two former LAWASIA Presidents from Malaysia the late Tara Sidhu (GTS Sidhu) (1987-89) and the redoubtable Dato’ Param Cumaraswamy who succeeded me as LAWASIA President in 1993-1995.

The brotherhood of lawyers all over the world has a strong bond in upholding the Rule of Law on the bedrock of Human Rights. The role of the Malaysian Bar in the Lawasia region has been outstanding and recognized with appreciation and distinction by the legal fraternity internationally.

When I came to Kuala Lumpur for a Lawasia Council meeting in the mid-eighties there was great tension between the Executive and the Judiciary and the Lawasia councillors fully supported the Malaysian Bar in its bold efforts to ensure an independent Judiciary. Even during the Commonwealth Law Conference members of the Malaysian Bar made outstanding and courageous contributions in fighting cases at grave personal peril to protect individual liberties.

II

Historical Migrations

Sub-continental India and the Indo-Gangetic plains have over the centuries received enormous migrations from the North-West. Historically invasions and wars, colonization, and proselytisation have been accompanied by large migrations. Today in India our largest minority is Muslims (India has the second largest Muslim population in the world after Indonesia) and there are over 15 million Christians. We are proud to have a secular Constitution and a pluralistic society and culture. The Indo Aryans, Turks, the Afghans and the Moguls and the British have left their imprint. They have contributed to a composite culture and civilization. Taj Mahal is a symbol of this composite culture. Modern India owes much to British rule. Our link language and the language of our Constitution and higher Courts is English. Our judicial institutions are based on the English judicial model. Last but not the least the British Rule gifted the great game of Cricket - A game which has migrated from the home country to Australia, New Zealand, Sri Lanka, Pakistan and India but for some reason has bypassed Malaysia. The cementing force and the bonding from these sporting exchanges are invaluable.

A great tide of emigration from India followed the advent of Buddhism in India. Gautama Buddha (Prince Siddharth) rebelled against traditional Hindu Brahmanism. Buddhism promoted castelessness and equality. Emperor Ashoka sent his son and daughter to Sri Lanka. Buddhist monks and scholars spread eastwards and went to Myanmar, Thailand, Indonesia and right upto Japan and China. Indian cultural and religious heritage was carried by these waves of migration. Similarly the whole of modern Australia and New Zealand are founded on large scale migration from England. North America again saw large waves of migrants due to religious intolerance and persecution in Europe. The second wave of migrants were slaves from Africa. The American Civil War was caused by the abolition of slavery and produced one of the greatest American Presidents Abraham Lincoln.

And see what migration has contributed to USA. The Afro-American occupies many high positions of State. They dominate sports like basketball and have contributed significantly to football and athletics and above all to the world revolution in music. The colour of the skin is becoming increasingly irrelevant all over the world.

Some years back I switched on the television for an *England v. India* cricket match. I saw a thunderbolt being bowled by a bowler with dark skin and curly hair. For a moment I thought that I was watching the West Indies team, but no, it was the English team with a good number of migrant players. Later Nasser Hussein (father from Madras and an English mother) captained England with distinction.

The Asian migrants from the Indian subcontinent to the West Indies have also played a great part in West Indian cricket. Many of their star batsmen and bowlers have Indian origins. To name a few - Sonny Ramadhin, Alvin Kalicharan, Chanderpaul, Sarwan are of Indian origin.

Today the World Cup has captured the imagination of football fans the world over. A large number of players in the French team are from migrant stock. Zinadine Zidane (Zizou) is of mixed Algerian descent.

III

International Instruments

The topic of 'Legal Migration' is at the centre of international debate and concerns. Economic globalization and the opening up of diverse sectors through the WTO and GATS has lent an urgency and importance to the problems faced by legal migrants. There is a wealth of international instruments and material on the subject.

UN Secretary General's Report

The United Nations Secretary General, Kofi Anan presented his Report dated 18th May, 2006 to the UN General Assembly on 6th June, 2006. The report gives many illuminating insights. In 2005, international migrants numbered 191 million out of which 115 million lived in the developed countries and 75 million in developing countries. Female migrants constitute nearly half of all migrants worldwide. Many advanced and dynamic economies need migrant workers to fill jobs that cannot be outsourced and they do not find local workers willing to take them at going wages – this is particularly applicable to low paid and physically demanding jobs. By enlarging the labour force and the pool of consumers and by contributing their entrepreneurial capacities, migrants boost economic growth in the host countries. Remittances by migrants total US\$ 232 Billion in 2005 out of which US\$ 167 Billion went to developing countries – greater in volume than current levels of official aid from all donor countries combined – though certainly not a substitute for it.

Mounting evidence indicates that international migration is usually positive both for countries of origin and of destination.

The report recommends that governments should develop a strategy based on the concept of co-development to reach a set of migration related goals *e.g.*, enhancing the benefits of international migration, ensuring migrations through legal channels, protecting the rights of migrants and preventing their exploitation and stopping smuggling and trafficking in human beings. Labour migration like the global mobility of human capital that it represents, has nonetheless become crucial for the global economy and is both a product and a producer of growing interdependence.

A major challenge in managing migration is to prevent irregular or unauthorized migration.

IV

UN Convention : 1990 (Migrant Workers' Convention)

The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (Migrant Workers Convention) was adopted by the UN General Assembly on 18th December, 1990 (now the World Migrants Day) without a vote and entered into force on 1st July, 2003 on being

ratified by 20 States – the required minimum. The current status (as at 19 April 2006) is ratification by 34 States which is 17% of the total number of countries. From the LAWASIA Region it appears that two states—Sri Lanka and Philippines—were the first of the few to ratify the Convention. They appear to be predominantly countries of origin. The Convention applies to both documented (regular migrants) and non-documented (irregular) migrants. It enumerates the human rights of all migrant workers and their families. Additionally there are further rights for regular migrant workers. It is labeled as the youngest of the principal UN Human Rights Treaties and recognizes the grim reality of deprivation of Human Rights of migrant workers. They are very vulnerable to Human Rights abuses eg freedom of movement, wrongful confinement by employers, arbitrary detention, physical & sexual abuse, discrimination, extortion by officials. Migrant workers are over 86 million according to an ILO estimate out of the total migrants worldwide. The Convention is monitored by a Committee which consists of experts of high moral standing and acknowledged impartiality serving in their personal capacity. Mr Prasad Kariyawasam of Sri Lanka was elected as Chairman of the Committee in March 2004, a feather in the cap of our colleagues from Sri Lanka.

V

International Labour Organization and its Instruments

The standards developed regarding migrant workers by two Instruments viz. Migration for Employment Convention Revised 1949 (No. 97) (42 Ratifications as on 12th February, 2004) and the Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143) (18 Ratifications as on 12th February, 2004) are significant. These Conventions reiterate the obligations to respect the basic Human Rights of all migrant workers and recommend equality of opportunity with regard to employment, trade union rights, cultural rights and collective freedoms.

The centerpiece of the ILO Standards and the UN Convention is the protection of basic Human Rights, which would include right to life and protection against arbitrary arrests and detention, freedom of expression and association, non-discrimination on any grounds including in particular gender discrimination. At the ILA (International Law Association) Biennial Conference recently held in June, 2006 at Toronto, the Committee on Feminism presented its Third Report on Trafficking of Women which also gives many insights into gender related immigration problems.

I am sure this Conference and its working sessions will deal in-depth with this large volume of complex and diverse material on the legal and social problems and international standards regarding protection of migrant labour.

VI

Negative Feeling and Global Backlash

Throughout the world the climate in developed countries is becoming decidedly negative regarding immigration. The fear of terrorism and the threat to internal security post September 11 are at the forefront of this perception.

There is a global backlash against migrants. It is sometimes called Securitization of Immigration. Additionally, a perception of migration causing loss of cultural identity, breakdown of social welfare structure and programmes, racism, crime, etc. adds to this negative feeling. The gradual integration of European Union (EU countries permit free travel within the Schengen area) has enhanced concerns regarding migration in Europe and the USA. Combating illegal migration is a key priority in EU. As against this the expanding economies in Asia like Japan, Hong Kong, Singapore and Malaysia are becoming new destinations and host countries for migrant workers. In the past several years many female migrants have come from Philippines, Sri Lanka and Indonesia. Apart from the GCC countries in the Middle East women migrants choose as their secondary destination countries like Malaysia, Singapore and Hong Kong.

VII

Immigration as Aggression: Supreme Court Judgment (2005) 5 SCC 665 Sarbananda Sonowal v. Union of India

If one sees the Indian map there is a very small land connection between sub-continental India and the North Eastern States known as the Seven Sisters. (Assam, Arunachal Pradesh, Meghalaya, Manipur, Mizoram, Tripura, Nagaland). Assam shares a large common border with Bangladesh. Under our Constitution citizenship was originally acquired by birth or by descent. Parliament has enacted the Citizenship Act under which registration and naturalization are additional modes of acquiring citizenship. Parliament has also provided for cancellation of citizenship wrongly obtained. The Foreigners Act, 1946 applies to all foreigners throughout India. There was a large influx of migrants from Bangladesh into the North Eastern States particularly Assam. Certain political parties for electoral purposes encouraged this large influx. The “push” factors which led to influx of illegal immigration from Bangladesh were steep and continuous increase in population, sharp deterioration in land-man ratio and low rate of economic growth. The “pull factor” on the Indian side were ethnic proximity (same and similar language as West Bengal and Assam), porous border, better economic opportunity and interested religious and political elements encouraging immigration for collecting vote-banks. This led to great disaffection amongst the local Indian population. The All Assam Students Union (AASU) and the All Assam Gana Sangram Parishad (AAGSP) spearheaded a mass movement against this influx and also captured political power in the State. A Memorandum of Settlement dated 15th of August, 1985 was entered into by the Union of India with the AASU known as the “Assam Accord”. The terms agreed required effective steps to be taken to detect and deport illegal migrants from Bangladesh. Meanwhile an Illegal Migrants Determination by Tribunals Act, 1983 (IMDT Act) was enacted by Parliament in a supposed effort to determine illegal migrants. A large number of Bangladesh Nationals who had crossed over to India without any documentation and who had occupied vast tracts of land with political encouragement got their names put on the voter’s list as citizens. In fact they acquired legitimacy as citizens. In spite of the Assam Accord no steps were taken to examine *bona fide* the failure of the IMDT Act regarding detection

and deportation of foreigners nor was the same repealed inspite of various assurances. The IMDT Act and the Rules, under the Act were so manipulated as to make it almost impossible to detect and deport illegal migrants contrary to the stated purposes of the Act. The Assam students challenged the constitutional validity of the IMDT Act in a Public Interest Litigation (PIL). The IMDT Act was only applied to the State of Assam and not to the neighboring State of West Bengal or other States for political reasons. The State of Assam then ruled by AASU and AAGSP filed a strong affidavit supporting the striking down of the IMDT Act. On a change in Government (Cong (I) coming to power) in the State a contrary affidavit was sought to be filed supporting the validity of the Act. The Supreme Court of India struck down as unconstitutional and invalid the impugned IMDT Act and Rules but the grounds on which the same were struck down [Supreme Court Judgment (2005) 5 SCC 665, *Sarbananda Sonowal v. Union of India*] are interesting. The Court noticed that all over the world in major democracies like USA, UK etc., the general rule was that the burden was on the person who claimed citizenship to prove the fact. A similar burden was also cast in the Foreigners Act in India but was absent in the impugned Act. This made the Act discriminatory and arbitrary. Further the Act was struck down as being violative of Article 355 of the Constitution of India which stated that:

“it was the duty of the Union to protect every State against external aggression and internal disturbance...”

The Court held that the word “aggression” had a wide meaning and was not to be confused with war. Relying on a US Supreme Court decision (130 US 581, *Chae Chan Ping v. US*) it held that the unregulated and enormous influx of immigrants from Bangladesh constituted “aggression”. It quoted Lord Denning from *The Due Process of Law*.

“In recent times England has been invaded — not by enemies – nor by friends – but by those who see England as a haven.”

The unabated influx of illegal immigrants from Bangladesh led the Supreme Court to remark:

“This being the situation there can be no manner of doubt that the State of Assam is facing “external aggression and internal disturbance” on account of large scale-illegal migration of Bangladeshi nationals.” (Para 63, P. 714)

The Supreme Court also held that it is far easier to secure conviction of a person in a criminal trial where he may be awarded capital punishment or imprisonment for life than to establish that a person is an illegal migrant on account of procedure under the IMDT Act and Rules (para 47, P. 706).

It was further held that

“ a deep analysis of the IMDT Act and the Rules made thereunder would reveal that they have been purposely so enacted or made so as to give shelter or protection to illegal migrants who came to Assam from Bangladesh on or after 25-3-1971 rather than to identify and deport them.” (para 47 P. 706)

The impugned IMDT Act was consequently struck down as being unconstitutional and violative of Article 355 of the Constitution and Article 14 of the Constitution as having no rational nexus with the policy and object of the Act.

In other words the effect of the judgment on those who were till then regarded as lawful migrants, (some of them even on electoral rolls) was to face scrutiny under the Foreigners Act. They had to discharge the onus of proving that they were citizens of India and therefore not liable to deportation.

This is an instance of security concerns influencing immigration — what has now been called after September 11 (9/11) as the securitization of immigration.

VIII

Sonia Gandhi Controversy

Sonia Gandhi, widow of the late Prime Minister, Rajiv Gandhi, is the most powerful migrant in India – nay the most powerful political personality. She is the President of the Congress-I, the largest single party in the ruling coalition government – UPA (United Progressive Alliance).

India went for a General Election to its Lok Sabha (House of the People) in May, 2004. The ruling coalition NDA (National Democratic Alliance), led by the BJP and its Prime Minister, A.B. Vajpayee lost and the Prime Minister resigned. Sonia Gandhi who had led the coalition to victory claimed to form the government and desired to be invited by the President. Her communication to the President Abdul Kalam was supported by the signatures of about 340 members of the Lok Sabha.

Meanwhile there were countrywide protests spearheaded by the main Opposition party, BJP (Bharatiya Janata Party) which was still in power as a caretaker government – that a foreign born personality should not become Prime Minister. Under the Indian Constitution there is no bar against any citizen from occupying any office and under the Citizenship Act, citizenship can be acquired on certain conditions by birth, descent, registration and naturalization.

Many representations were made to the President. Dr. Subramanian Swamy heading the Janata Party and a former Law Minister sent a letter to the President on 15th May, 2004 stating:

“In particular, in this case Ms. Sonia Gandhi – she is subject to the proviso under section 5 of the Citizenship Act, a reciprocal disqualification to be the PM (Prime Minister) of the country since she is Italian. Kindly therefore ascertain the legal position from the Home Minister before considering Ms. Gandhi’s claim.”

The thrust was that a person of Indian origin even if recognized as an Italian citizen could not be Prime Minister of Italy and consequently an Indian citizen of Italian origin could suffer from a similar reciprocal disqualification.

Subsequently the proviso to section 5 of the Citizenship Act has been deleted by the ruling coalition with a view to negate such objections in the future.

Sonia Gandhi met the President alone on 18th May, 2004 and thereafter announced that her “inner voice” told her not to accept the position of Prime Minister. In spite of great pressure from her party she did not change her decision. She nominated on behalf of the party the present Prime Minister, Man Mohan Singh, who has no political base.

What transpired at her meeting with the President will only be known when the main players are out of power. But Article 102 of the Constitution disqualifies an elected member of Parliament on several grounds. If a question is raised about disqualification it has to be decided by the President finally under Article 103 on the basis and according to the opinion of the Election Commission. Therefore, if a *prima facie* case is made out regarding disqualification there would be a regular hearing by the Election Commission before the President’s final decision would be available. One speculation is that to avoid these messy proceedings she opted out of the race to become Prime Minister.

Even earlier, her citizenship was challenged and the litigation came upto the Supreme Court [*Hari Shanker v. Sonia Gandhi*, (2001) 8 SCC 233]. Sonia Gandhi an Italian by birth married Rajiv Gandhi, the son of the late Smt. Indira Gandhi in 1968. She then migrated to India and did not apply for citizenship till 30th April, 1983 after Rajiv Gandhi joined politics. This was after the death of his younger brother Sanjay Gandhi, an active politician, who died in a plane crash. She was recognized as a citizen by registration under the Indian Citizenship Act. When she was elected for the first time to the Lok Sabha in 1999, election petitions were filed for disqualifying her in the High Court of Allahabad on the ground that she was not a citizen of India and her registration as citizen be cancelled. The High Court dismissed the petition on several grounds. The Supreme Court confirmed the decision not on merits but on the ground that sufficient material and pleadings supported by details on personal knowledge were not averred in the Election Petition as required by Indian Election Law. However, the Supreme Court took the view that the Courts had the jurisdiction to decide a question of the validity of a citizenship certificate obtained by an elected candidate. In other words the Court could set aside an election in an appropriate case if it was proved that the citizenship certificate was wrongly obtained.

Later another petition filed in 2002 before the Delhi High Court by Dr. Subramanian Swamy as a Public Interest Litigation was dismissed by the High Court (21 April, 2005) on the ground that petitioner had placed no evidence acceptable to the Court and had made vague averments to cancel Sonia Gandhi’s citizenship which was granted to her in 1983. The Court also found that there was inordinate delay in filing the Petition without availing the remedy under the statute and further that the Petitioner had no personal knowledge in relation to various averments made. A Petition for leave to appeal against this judgment was denied by the Supreme Court summarily. In sum, Sonia Gandhi, a migrant who is now a citizen of India, enjoys enormous political power as the President of Congress-I – even more than the Prime Minister.

Hirsi Ali: A Migrant who shook the Dutch Government

Ayaan Hirsi Ali was a Somali migrant who became a Dutch citizen and a member of its Parliament. She was a critic of militant Islam. She wrote the

script for a controversial film attacking Islam made by Theo Van Gogh. He was murdered later by a radical Islamist. Hirsi Ali lived under police protection.

The Netherlands's Immigration Minister, Rita Verdonk raised the issue that Hirsi Ali having made false statements in her asylum application was disqualified to be a Dutch citizen.

The Minister was a part of the ruling coalition and her threat to revoke Dutch citizenship of Hirsi Ali led to the collapse of the coalition government. One of the alliance members in the ruling coalition attacked the Minister, Rita Verdonk's policy which triggered the resignation of the coalition government.

This is another instance of a powerful migrant influencing political events in the host country.

Conclusion

The wind is blowing in favour of integration of the world by migrants but there is turbulence because of security concerns. The signature tune of the UN Secretary General's report is the theme and goal of co-development *i.e.*, co-ordinated or concerted improvements of economic and social conditions at both – the country of origin and the country of destination harmonizing and developing the strengths of both and reducing their weaknesses. Regional initiatives would greatly contribute to promoting this goal and this Conference I am sure will encourage initiatives promoting co-operation in the Lawasia region.

19

Human Rights versus Section 377

This article was published in the Hindu on 12 October, 2006 attacking the validity of Section 377 of the Indian Penal Code, which criminalised homosexual practices between consenting adults. Subsequently a bench of the Delhi High Court (CJ Ajit Prakash Shah and Dr. Murlidhar J.) partially invalidated the section by decriminalising such practices between consenting adults in private. The matter is now pending in the Supreme Court.

The debate on the continued relevance of Section 377 of the Indian Penal Code is on centre-stage. The issue is whether homosexual practices between consenting adults, in private, should be decriminalised by amending the section.

In India, it has a very serious public health dimension relating to HIV/AIDS prevention. Sujatha Rao, the Director General of the National AIDS Control Organisation (NACO), a Central Government agency, at a recently held international conference is reported to have said that "Section 377 places a huge constraint on Government's HIV/AIDS programme ... if you criminalise any behaviour you increase the chances of it going underground. We are hoping to change that."

The letter of Vikram Seth signed by many citizens (including myself) and the statement of Amartya Sen pleading for decriminalising homosexual behaviour in private, between consenting adults, have given high visibility to this debate.

The human rights of homosexuals, as recognised in other jurisdictions, will help the Indian citizen to arrive at an informed judgment and de-stigmatise a significant segment of our population. The American Psychological Association has opined that "despite historical views of homosexuality, it is no longer viewed by mental health professionals as a 'disease' or 'disorder'. But obviously, neither is it simply a matter of deliberate personal selection. Homosexual orientation may well form part of the very fibre of an individual's personality." And the European Court of Human Rights, while deciding a case from Ireland, noticed that "exclusive homosexuality can be congenital or acquired." Some are born with long noses, big ears, or blond hair, so it could be with a homosexual.

In England, homosexual behaviour between consenting adults, in private, was decriminalised in 1967 pursuant to the Wolfenden Committee report.

In 1981, Jeffrey Dudgeon, a shipping clerk in Belfast, applied to the European Court of Human Rights challenging the provisions outlawing homosexuality in Northern Ireland on the ground that they violated his privacy right under Article 8 and his right to equality and non-discrimination under Article 14 of the European Convention of Human Rights. The Court declared the law, insofar as it criminalised homosexual acts between consenting adults, in private, as impinging on the privacy right under Article 8 but did not consider it necessary to deal with the equality challenge. The Court noticed that in a great majority of the member states of the Council of Europe, the sanctions of the criminal law were not applied to such practices.

In 1988, David Norris, an Irish citizen and a lecturer in English in Trinity College Dublin, and a member of the Irish Parliament who was an active homosexual and chairman of the Irish Gay Rights Movement challenged before the European Court the validity of the provisions of Irish law criminalising homosexuality in private, between consenting adults. He failed in the Irish Courts, but succeeded in the European Court, and was awarded substantial damages and costs. In 1992, Alecos Modinos, a Cyprus citizen and president of the Liberation Movement of Homosexuals in Cyprus, challenged the provisions of Cyprus laws criminalising homosexual practices in private, between consenting adults. The European Court, following its earlier judgment invalidated the law, notwithstanding the plea of the Cyprus government that as a matter of policy after the 1981 Dudgeon judgment of the European Court, no prosecution was initiated relating to homosexual behaviour in private, between consenting adults.

In the United Kingdom, interesting cases arose from the government's absolute policy of banning employment of homosexuals in the armed forces. Duncan Lustig-Prean joined the Royal Navy Reserve as a radio operator in 1982. He had a homosexual relationship with a civilian partner. On anonymous information and after an inquiry by the Military Police, his service was terminated on the ground of his sexual orientation. He failed in the High Court, the Court of Appeal, and the House of Lords. The European Court while affirming the right of every state to formulate its own policy regarding armed forces, held that on the facts of the case, his privacy right was violated and the government was unable to justify its absolute policy by concrete evidence to substantiate its allegations of negative effect on the armed forces. He was awarded non-pecuniary damages of £19000, and further £94,875 as pecuniary damages and, in addition, costs and expenses of £34,000. Ms. Jeannette Smith, who joined the Royal Air Force as a nurse and was promoted to the rank of Senior Aircraft Woman, was discharged after an anonymous tip and an inquiry, where she admitted that she was a homosexual. She succeeded before the European Court on the facts, on the ground of the violation of her privacy rights, and was awarded substantial damages and costs.

The South African Constitution of 1996 alone has a unique provision in its Bill of Rights. Article 9 provides equality before the law and the equal protection

and benefit of the law and enjoins the state as well as all persons not to unfairly discriminate, directly or indirectly, against anyone on several grounds including sexual orientation. In 1998, the Constitutional Court of South Africa, one of the most respected international judicial institutions, unanimously invalidated provisions of several criminal laws, which made punishable homosexual conduct between consenting adult males in private, as violative of the Equality Clause. The judgment was delivered on application of the National Coalition for Gay and Lesbian Equality and the South African Human Rights Commission. The judgments of Ackermann and Sachs JJ, are a tour de force and summarise the law of several countries, including Australia, Canada, New Zealand, and the decisions of the European Court of Human Rights. The court observed that even though the provisions in South African law against such homosexual practices were not enforced, the provisions were invalidated because "they reduce gay men to the status of 'unapprehended felons,' thus entrenching stigma and encouraging discrimination." It further observed that "the enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as a legitimate purpose."

The Hong Kong Court of Appeal, in September 2006, unanimously invalidated similar provisions in Hong Kong laws, which criminalise homosexual practices in private, between consenting adults. In August 2005, the High Court of Fiji invalidated similar laws. It is worth recalling that Justice Michael Kirby, one of the most distinguished serving judges of the High Court of Australia, and Justice Edwin Cameron, a great anti-apartheid activist and now a serving Judge of the Supreme Court of Appeal in South Africa, have publicly acknowledged their gay status for many years.

In 1986, the United States Supreme Court upheld, by 5 against 4, a Georgia statute criminalising homosexual behaviour in private, between consenting males. However, in 2003, the earlier majority judgment was overruled and the minority judgment approved, by a majority of 6 against 3, while invalidating a Texas statute and quashing the convictions based on it. The earlier minority judgment, which was reinstated, had observed that "a state can no more punish private behaviour because of religious intolerance than it can punish such behaviour because of racial animus" and "only the most wilful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central in family life, community welfare and the development of human personality."

Justice Clarence Thomas, while dissenting and upholding the Texas law, made this significant observation: "I write separately to note that the law before the Court today is uncommonly silly" and "if I were a member of the Texas legislature I would vote to repeal it." Earlier, in 1995, the U.S. Supreme Court (6 against 3), invalidated an amendment to the Constitution of Colorado, adopted in a referendum, on the ground that it violated the equal protection clause. The amendment sought to repeal various local laws that banned discrimination in many activities like housing, employment, and education, on the basis of sexual orientation and protected gays or lesbians against discrimination.

India must march in step with other democracies on this human rights issue. It must emulate the sentiment of the European Court that such restrictions on the most intimate aspect of private life are not necessary in a democratic society that values tolerance and broadmindedness. It is high time the Indian Parliament brought our Penal Code in line with these international legal standards on human rights, which are applied in Europe, the U.S., Canada, South Africa, Australia, New Zealand, Hong Kong, and Fiji. This reform is urgent because Section 377 poses a threat to public health by impeding programmes for the prevention and control of HIV/AIDS. Should not our Parliament adopt the view of the ultra-conservative Justice Clarence Thomas of the U.S. Supreme Court, who, while upholding the Texas law in his dissent, characterised it as uncommonly silly and observed that he would vote to repeal it, if he were a legislator?

20

Terrorism – Human Rights – Rule of Law

*This speech was delivered at a LAWASIA Seminar on
“Information Technology, Cyber Crimes and Terrorism” at
Hyderabad (31 January 2009 to 1 February 2009).*

*It deals with terrorism, the rule of law and the manner in
which innocent persons were convicted and later released
due to public and media pressure on the Police in the
UK- the cases of the Birmingham Six, the Guildford Four and
Maguire Seven are noted. The Dr. Mahammed Haneef case in
Australia, the Guantanamo Bay litigation in USA and the
assassination of a Sri. Lankan editor are also discussed.*

I

Terrorism and Rule of Law – The Dilemma

The terrorist attacks in Mumbai on 26th November, 2008 - the sheer audacity, the military planning and ruthless execution has outraged Indian citizens.

The terrorist attacks on the World Trade Centre in New York on 11th September, 2001, evoked similar sentiments in USA. The war against Al-Qaeda and Osama-Bin-Laden and the attacks in Afghanistan were a direct sequel. Stringent detention laws and interrogation techniques violative of basic human rights standards were adopted. Guantanamo Bay became notorious as the interrogation techniques slowly surfaced with tell-tale photographs.

The cult of violence, intolerance and religious fanaticism has recently raised its ugly head in various parts of India — whether it be destruction and attack on Churches in Orissa or moral policing in Mangalore or hatred for North Indians in Mumbai. We must battle and defeat these aberrations and live up to the Constitutional ideals enshrined in the preamble, namely to secure Justice, Liberty, Equality and Fraternity assuring the dignity of the individual and the unity and integrity of the nation.

A citizen anywhere in the world wants law and order - safety of his home and family - reasonable security while earning his daily bread. The ordinary citizens all over the world do not mind if the state uses overwhelming force

to neutralize any terrorist threat. Further, after high visibility terrorist attacks society requires the security forces to produce results quickly - creating enormous pressures on the police and other investigative agencies.

The result is an immense threat to human rights and the Rule of Law — the threat becomes more dangerous if the police forces are incompetent, corrupt, poorly trained and badly equipped.

This is the dilemma and civil liberty groups, the judiciary and the executive have to workout a balance between containing and neutralizing terrorist activities on the one hand and maintaining human rights and Rule of Law on the other.

II

The Taliban – Pakistan : Swat Valley

Terrorism and Fundamentalism are on the doorsteps of India. A recent report published in the New York Times has been widely reported in the Indian dailies. It describes what is happening in Swat Valley, a picturesque resort about 100 miles from Pakistan's capital Islamabad. This is not far from Kashmir. In the Swat valley, the rule and diktat of the Taliban prevails. Every night local Taliban leaders announce on radio the names of people the Taliban have recently killed for violating their decrees and those they plan to kill. Many on the list flee overnight or they would be punished by a lashing or even a beheading.

"Un-Islamic" activities include allowing girls to attend schools, watching cable television, singing and dancing or criticizing the Taliban. The Taliban fighters roam through the Swat Valley intimidating the population. A Taliban commander directed 50 officials and dignitaries including lawmakers, the local mayor, elders and members of provincial and national assemblies to attend his "Court". Their absence would mean that they would be targeted.

Last year several police officials were killed and wounded and some of them put advertisements in newspapers renouncing their jobs so the Taliban will not kill them.

There is no 'Rule of Law'- there are no civil liberties- there is no freedom of expression - there is no safety from organized terror.

III

THE U.K. EXPERIENCE

The Birmingham Six

On 21st November, 1974 bombs exploded in two popular Birmingham Pubs (Restaurants). 21 persons were killed and over 180 injured. Six Roman Catholics born in Belfast (Northern Ireland) were arrested among others. The Provisional Irish Republican Army (IRA) was blamed. Confessions, later repudiated at the trial, were obtained. On 15 August, 1975, Six persons were found guilty of murder and conspiracy and were sentenced to life. (They were - Hugh Callaghan, Patrick Joseph Hill, Gerard Hunter, Richard McKenny, William Power and John Walker)

The Six pressed for damages against the police for assault, intimidation and torture under the Police Act. The Court of Appeal (Lord Denning) characterized their claim as an abuse of the process of the court and as being barred by issue estoppel. [*McIlkenny v. Chief Constable*, (1980) 2 All ER 227].

Later Chris Mullin investigated the case for Granada TV and published a book*. The British Government referred the case back to the Court of Appeal. The convictions were again upheld.

A massive campaign in terms of newspaper articles, documentaries and books uncovered new evidence and there was a groundswell in favour of the Six. Their third appeal in 1991 was successful. New evidence of fabrication by the police and suppression of evidence was uncovered and the alleged confessions were discredited. The government withdrew its case against the accused. The sequel was a Royal Commission on Criminal Justice which reported in 1993 and led to new legislation and the establishment of the Criminal Cases Review Commission in 1997.

Later in 2001, the Six were awarded compensation by the Government ranging from over 800,000 to 10,00,000 pounds.

The Guildford Four and Maguire Seven

Similar wrongful convictions by British Courts of the Guildford Four and the Maguire Seven took place in 1970s. The convictions were ultimately reversed after they had served many years in prison.

The Guildford four were charged with direct involvement with attacks and bombings in Guilford pubs attributed to the Irish Republican Army (IRA). The feelings ran so high in England that they overwhelmed even the Justice System. Justice Donaldson who presided over the Maguire Seven trial expressed regret that they were not charged with treason which carried a mandatory death penalty. In both cases appeals were unsuccessful.

Later, in another trial in February, 1977 the accused in that case claimed that they were responsible for the Guildford attacks and four innocent persons were serving wrong sentences. In 1989, a detective uncovered typed notes of contemporaneous police interviews with deletions, additions and re-arrangements. It was clear that the police had manipulated and fabricated evidence. The Lord Chief Justice Lane held that the police had either fabricated the typed notes or amended contemporaneous notes and then converted them back into alleged contemporaneous handwritten notes. The convictions of the Guildford Four were reversed.

The verdicts against Maguire Seven were reversed in 1991 and the Court held that the London Metropolitan Police had obtained confessions after intimidations, beatings and torture. Tony Blair, the then Prime Minister, publicly apologized in February, 2005 for the injustice.

This is how justice and human rights were subverted even in Britain where standards of efficiency and integrity are much higher than in many other countries.

As against the above collapse of the Rule of Law, the public opinion built up in a free society by investigative journalists is to be commended. The journalist

Chris Mullin who later became a Minister and his book “Error of Judgment - the Truth about the Birmingham Pub bombings” and the role played by the counsel in the final successful appeal are praiseworthy. Similarly, Robert Kee published in 1986 the book - “Trial and Error : the Maguires, the Guildford pub bombings and British Justice” which had considerable impact on the reversal of the verdicts.

In an article in *Manitoba Law Journal* Vol. 31 No. 3 (2006), the author Bruce Mac Farlane, Q.C. perceptively remarks:—

“The legacy of the IRA bombing cases was three-fold. First, the cases demonstrate that the “hydraulic pressure” of public opinion is capable of creating an atmosphere in which state authorities seek to convict someone despite the existence of ambiguous or contradictory evidence. Second, scientists working in government-operated laboratories may tend to feel “aligned” with the prosecution, resulting in a perception that their function is to support the theory of the police rather than to provide an impartial, scientifically based analysis. This, in turn, raises issues concerning the physical location and reporting relationship of government or police forensic laboratories.

Finally, scientists relied upon by the Crown have an obligation to disclose to the prosecution evidence of any tests carried out which tend to cast doubt on the opinion proposed to be tendered in evidence, and the prosecution bears a parallel and continuing obligation to disclose those facts to the defence - irrespective of whether the defence has made a request for such disclosure.”

IV

The Australian Scene : The Haneef Case

In July 2007 Dr. Mohammed Haneef was arrested at Brisbane Airport, Australia on suspicion of terror related activities. He is the first cousin of Kafeel Ahmed and Sabeel Ahmed involved in the 2007 attack on Glasgow International Airport. Dr. Haneef was an Indian citizen and was working under the Australian Temporary Skilled Workers Scheme as Registrar at the Gold Coast Hospital. His arrest and detention was under the Anti-Terrorism Act, 2005. It was alleged by the Australian prosecutor that he had left his SIM card and a mobile phone with his cousin Sabeel Ahmed and the said card was found inside the vehicle used in the Glasgow attack. This allegation as discovered later was incorrect.

He was granted bail but thereafter his Visa was cancelled jeopardizing his employment as a Doctor in Australia. The Federal Court overturned the cancellation. The then Immigration Minister Kevin Andrews, the Police Force and other Law enforcement agencies came under strong criticism from the media. Dr. Haneef’s case was fought with vigour by his Australian lawyers Steven Keim and Peter Rousso. The Australian legal fraternity criticized the illegal detention and wrongful cancellation of his Visa. The then Premier of Queensland Peter Beattie said that Haneef had been treated “appallingly”.

Justice Spender of the Federal Court at the preliminary hearing regarding Visa cancellation remarked that the Government's argument that mere association with a suspected criminal means that a foreigner fails the character test for the purposes of his 'Visa' was astounding and even he could not pass such a character test as he had represented murderers in the past.

It appeared that the Police, the political executive right up to the then PM John Howard politicized the issue to make political capital and in the process disinformation was circulated.

The Australian elections took place and the former Prime Minister John Howard was defeated and the new administration under Kevin Rudd came to power in December, 2007.

The Justice Clarke Enquiry Report seems to have concluded that the evidence against Dr. Haneef was completely deficient. The Counter Terrorism domestic unit commander Ramzi Jabbour had lost objectivity and even though police officers who had interrogated Dr. Haneef had refused to charge him, Jabbour personally charged him.

The Australian legal fraternity and Civil Liberty groups vigorously supported Dr. Haneef and exposed the injustice done to him. This shows how Civil Liberties are protected in a democracy where freedom of speech and strong legal traditions act as bulwarks for protecting individual rights.

V

USA

Guantanamo Bay (GTMO) "GITMO"

U.S. Naval Base Guantanamo Bay is the oldest U.S. base overseas and the only one in a Communist country. Located on the southeast corner of Cuba, in the Oriente Province, the base is about 400 air miles from Miami, Florida. In December 1903, the United States leased the 45 square miles of land and water for use as a coaling station.

President Obama orders Suspension of Prosecutions

On 21 January, 2009, President Obama ordered suspension of prosecutions of Gitmo detainees for 120 days in order to review all the detainees cases to determine whether and how each detainee should be prosecuted. A day later, Obama signed an Executive Order stating that Gitmo would in fact be closed within the year.

According to a report in Washington Post on January 25, 2009 his plan encountered a setback -when incoming officials of his administration discovered that there were no comprehensive files concerning many of the detainees, so that merely assembling the available evidence about them could take weeks or months.

^s DeYoung, Karen; Finn, Peter (January 25, 2009), "Guantanamo Case Files in Disarray", *The Washington Post*: A05, <http://www.washingtonpost.com>

The US Judicial decisions, after the exposures and photographs in the international press and media may be noticed. These decisions have the effect of broadening the human rights of the detainees.

Rasul v. Bush, 542 US 466 (2004), is a landmark United States Supreme Court decision establishing that the U.S. court system has the authority to decide whether foreign nationals (non-U.S. citizens) held in Guantanamo Bay were wrongfully imprisoned. The 6-3 ruling on June 29, 2004, reversed a District Court decision, which held that the Judiciary had no jurisdiction to handle wrongful imprisonment cases involving foreign nationals who are held in Guantanamo Bay. Justice John Paul Stevens wrote the majority opinion and was joined by Sandra Day O'Connor, David Souter, Ruth Bader Ginsburg, and Stephen Breyer, with Anthony Kennedy concurring. Justice Antonin Scalia filed a dissenting opinion and was joined by William Rehnquist and Clarence Thomas. The claimant whose name the case bears, Shafiq Rasul, was released before the decision was handed down.

Hamdi v. Rumsfeld, 542 US 507 (2004) was a U.S. Supreme Court decision reversing the dismissal of a *habeas corpus* petition brought on behalf of Yaser Esam Hamdi, a U.S. citizen being detained indefinitely as an "illegal enemy combatant". The Court recognized the power of the government to detain unlawful combatants, but ruled that detainees who are U.S. citizens must have the ability to challenge their detention before an impartial judge.

Hamdan v. Rumsfeld, 548 US 557 (2006), is a case in which the Supreme Court of the United States held that military commissions set up by the Bush administration to try detainees at Guantanamo Bay lack the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949. Specifically, the ruling says that Common Article 3 of the Third Geneva Convention was violated.

The case considered whether the United States Congress may pass legislation preventing the Supreme Court from hearing the case of an accused combatant before his military commission takes place, whether the special military commissions that had been set up violated federal law (including the Uniform Code of Military Justice and treaty obligations), and whether courts can enforce the articles of the 1949 Geneva Convention.

Boumediene v. Bush, 553 US 723 (2008), was a writ of *habeas corpus* submission made in a civilian court of the United States on behalf of Lakhdar Boumediene, a naturalized citizen of Bosnia and Herzegovina, held in military detention by the United States at the Guantanamo Bay detention camps. The case was consolidated with habeas petition *Al Odah v. United States*. The case challenged the legality of Boumediene's detention at the Guantanamo Bay military base as well as the constitutionality of the Military Commissions Act (MCA) of 2006. Oral arguments on the combined case were heard by the Supreme Court on December 5, 2007. On June 12, 2008, Justice Kennedy wrote the opinion for the 5-4 majority holding that the prisoners had a right to the habeas corpus under the United States Constitution and that the MCA was an unconstitutional suspension of that right.

VI

Sri Lanka: Assassination of Editor Lasantha Wickrematunge

The continuing ethnic conflict in Sri Lanka has spawned a culture of terrorism and violence unsurpassed in South East Asia.

The Sri Lankan State forces and the LTTE (Tamil Tigers) have been in a state of hostilities. The casualty has been the Tamil Civilian population of Sri Lanka. In the event, intolerance, violence, assassination and media censorship have grown at the cost of Civil Liberties.

The fearless Editor of the "Sunday Leader" Lasantha Wickrematunge was assassinated on his way to work by two gunmen on January 8, 2009 for espousing the cause of Press freedom and attacking the State and the Government.

He wrote an Editorial (posthumously published) in the Sunday Leader. Some of the extracts set out below are ennobling and inspirational:—

"Neither should our distaste for the war be interpreted to mean that we support the Tigers. The LTTE are among the most ruthless and bloodthirsty organizations ever to have infested the planet. There is no gainsaying that it must be eradicated. But to do so by violating the rights of Tamil citizens, bombing and shooting them mercilessly, is not only wrong but shames the Sinhalese, whose claim to be custodians of the "dhamma" is for ever called into question by this savagery, much of which is unknown to the public because of censorship"..

"Every newspaper has its angle, and we do not hide the fact that we have ours. Our commitment is to see Sri Lanka as a transparent, secular, liberal democracy. Think about those words, for each has profound meaning. Transparent because government must be openly accountable to the people and never abuse their trust. Secular because in a multi-ethnic and multi-cultural society such as ours, secularism offers the only common ground by which we might all be united. Liberal because we recognise that all human beings are created different, and we need to accept others for what they are and not what we would like them to be. And democratic... well, if you need me to explain why that is important, you'd best stop buying this paper."....

"People often ask me why I take such risks and tell me and it is a matter of time before I am bumped off. Of course I know that: it is inevitable. But if we do not speak out now, there will be no one left to speak for those who cannot, whether they be ethnic minorities, the disadvantaged or the persecuted."....

"As for me, I have the satisfaction of knowing that I walked tall and bowed to no man. And I have not travelled this journey alone. Fellow journalists in other branches of the media walked with me: most of them are now dead, imprisoned without trial or exiled in far-off lands."

Let us all try and walk tall and bow to no arbitrary authority.

21

Is Death Penalty a Terror Deterrent?

*This article was published in the Hindu on 22nd August, 2015
The article was written, soon after the execution of the death
sentence awarded to Yakub Memon on 30th July, 2015,
the prime accused in terrorist attacks in Mumbai in 1993,
which killed 257 people and injured many others.*

The city of Mumbai was the target of unprecedented terrorist attacks on March 12, 1993. Twelve bomb explosions, in a span of about two hours, shook the city and left 257 people dead and 713 seriously injured. After investigations, a prolonged legal process and the judgment after nearly 20 years, Yakub Memon was named a prime accused and awarded the death sentence. He was executed on July 30, 2015. Our judiciary and the Supreme Court in particular must be applauded for the manner in which the trials and appeals were conducted in the case.

Fair Trial and Due Process

On March 21, 2013, a bench comprising Justices P. Sathasivam and B.S. Chauhan disposed of the death sentence cases and the criminal appeals of the accused after one of the longest hearings which resulted in a massive judgment of 2,995 paragraphs and 1,004 pages of the Law Reports.

The judgment not only examined the guilt of over 100 accused who were convicted, but also individually discussed the sentences. A Terrorist and Disruptive Activities (Prevention) Act (TADA) court had awarded the death sentence to 10 other persons but the Supreme Court confirmed the death sentence of Yakub alone; it was commuted to life imprisonment for the rest. On July 30, 2013, the same bench rejected the review petitions after denying oral hearings.

Later, the Supreme Court decided in Mohammed Arif's case (2014) 9 SCC 737) that limited oral argument be permitted in review applications in death sentence cases. Consequently, on April 9, 2015, a Supreme Court bench comprising Justices Anil R. Dave, J. Chelameswar and Kurian Joseph heard oral arguments in a review petition filed by Yakub after going through the judgment under review as well as the judgment of the trial court. The review was dismissed.

A curative petition was then filed and on July 21, 2015, a Supreme Court bench comprising Chief Justice H.L. Dattu, and Justices T.S. Thakur and Anil R. Dave rejected the petition, holding that there was no ground made out.

Another writ petition was filed by Yakub (Writ Petition, (Crl.) No. 129 of 2015). There was a difference of opinion between two judges on the question of whether the curative petition had been decided in accordance with the law and as per the requirement of Supreme Court Rules. Following this, the Chief Justice of India immediately constituted a bench of Justices Dipak Misra, Prafulla C. Pant and Amitava Roy which dismissed the writ petition on July 29, 2015 and held that there was no flaw in the decision on the curative petition and that the issue of death warrant was in order. Another writ petition (W.P. (Crl.) No. 135 of 2015) was filed and heard on the night of July 29/the morning of July 30, 2015 by the same bench, which dismissed it and observed that a further stay of the execution of the death warrant would be nothing but a travesty of justice.

Yakub's conviction and death sentence was examined by eight judges in the Supreme Court from time to time before his execution on the morning of July 30, 2015. Not only was due process fully ensured but also undue lengthening of due process was accommodated by the highest court, by granting a midnight hearing. Justice according to the law has not only been done but was seen to be done. The criticism that, on merits, justice has not been done to Yakub Memon is absurd.

Every Indian should be proud of the manner in which this case has been dealt with by the judiciary.

Is the Death Penalty Justified?

Under the Indian Penal Code (IPC), there are several offences which may attract a death penalty or life imprisonment. These include murder — Section 302; waging war (including attempt and abetment) — Section 121, and mutiny — Section 132. Under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) (now repealed but in force in 1993) and under the Prevention of Terrorism Act, 2002 (POTA) (now repealed), the death sentence could be awarded for terrorist acts.

Bomb explosions and the loss of lives as a result of terrorist attacks are completely different in nature, objective and motivation from a common murder. In this case, the objective is not to target someone in particular but to destabilise society and to encourage the disintegration of the sovereignty and security of a nation. Such terrorist attacks are often state-sponsored — and are an act of undeclared war.

For many years India has faced, and still faces, the most severe threats on account of terrorism. India was regarded as a “sponge” until the world took notice of the evolving nature and threat posed by terrorism after the terror attack on the World Trade Center on September 11, 2001.

Awarding someone the death penalty for acts of terrorism is qualitatively different from awarding someone the death penalty for having committed other crimes.

A criticism levelled by some against the death sentence having been awarded to Yakub reiterates the familiar argument that the death penalty as such should be abolished as it is a violation of human rights and is an inhuman and cruel form of punishment.

In the seminal case of *Bachan Singh*, the majority judgment upheld the constitutional validity of death penalty for murder under Section 302 of the IPC.

In his vigorous dissent, Justice P.N. Bhagwati, while declaring unconstitutional and void Section 302 (IPC) read with Section 354 (3) (Cr.P.C) as being violative of Articles 14 and 21, made the following observation: "I may make it clear that the question to which I am addressing myself is only in regard to the proportionality of death sentence to the offence of murder and nothing that I say here may be taken as an expression of opinion on the question whether a sentence of death can be said to be proportionate to the offence of treason or any other offence involving the security of the State" — (1982) 3 SCC 24 at 76).

These words, from the strongest votary against the death penalty, are revealing. Justice Bhagwati clearly indicated that his observations do not apply to punishment of death in relation to terrorist acts or to treason — implicitly endorsing the death penalty for terrorist acts.

While abolition of the death penalty for crimes other than terrorist acts or treason may be justified, its retention in the case of punishment for having carried out terrorist acts or treason seems equally justifiable.

How Effective?

The death penalty may be well deserved and a judge has to make a decision according to the law. The power to commute the death sentence ought to be exercised by the Executive selectively.

After Yakub's execution in Nagpur, his body was flown to Mumbai the same day. Large crowds thronged his residence, the mosque at Mahim and at his burial at Marine Lines.

There is increasing support for the view that the death penalty for terrorists may not only be ineffective but also be counterproductive. Why? Terrorists, when awarded the death penalty, become martyrs influencing many other misguided youngsters to espouse a similar cause. Many religious fanatics believe in reward in the "after life" and endless pleasures in heaven. Not awarding them the death penalty would mean depriving them of the "anticipated rewards in heaven". Again, imprisonment and incarceration of a terrorist may result in yields — obtaining information relating to other terrorist organisations.

Here, it is worth citing Jessica E. Stern, an expert on counterterrorism and a lecturer at Harvard University, who also served on the National Security Council (1994-95) in the United States. In an article published in *The New York Times* on February 28, 2001, titled "Execute terrorists at our own risk", she had said this:

"As a nation, we have decided that terrorism that results in loss of life should face the possibility of the death penalty. But is this wise?

".... One can argue about the effectiveness of the death penalty generally. But when it comes to terrorism, national security concerns should be paramount. The execution of terrorists, especially minor operatives, has effects that go beyond retribution or justice. The executions play right into the hands of our adversaries. We turn criminals into martyrs, invite retaliatory strikes and enhance the public relations and fund-raising strategies of our enemies...

"... For instance, the United Kingdom in 1973 debated whether to repeal the death penalty in Northern Ireland. By a margin of nearly three to one, the House of Commons decided that executing terrorists, whose goal is often to martyr themselves, only increased violence and put soldiers and police at greater risk. In a highly charged political situation, it was argued, the threat of death does not deter terrorism. On the contrary, executing terrorists, the House of Commons decided, has the opposite effect: It increases the incidence of terrorism."

Alan Dershowitz, the American lawyer and a life-long opponent of capital punishment, wrote in *The Guardian* on April 24, 2013 about the death penalty. In an article titled "Dzhokhar Tsarnaev should not face the death penalty, even for a capital crime", and which was about the surviving Boston marathon bomber, he wrote:

"...There is an argument, however, that could have an impact even on proponents of the death penalty.

"Seeking the death penalty against Tsarnaev, and imposing it if he were to be convicted, would turn him into a martyr. His face would appear on recruiting posters for suicide bombers. The countdown toward his execution might well incite other acts of terrorism. Those seeking paradise through martyrdom would see him as a role model."

The question one needs to ponder over is whether the execution of a particular death sentence awarded to a terrorist would be counterproductive.

22

Gay Rights are Human Rights

*This article was published in the Hindu on 19th February, 2016
The Delhi High Court by its judgment dated 2nd July, 2009
decriminalized Section 377 in case of consensual adult sex in
private. The Supreme Court reversed this judgment on 11th
December, 2013 validating Section 377 of IPC. Review was also
dismissed on 28th January, 2014. Currently, several curative
petitions have been referred to a Constitution Bench
on 2nd February, 2016 which are pending.*

The human rights of LGBTQ (Lesbian, Gay, Bisexual, Transgender, and Queer) people have reached centre stage. Curative petitions have been referred to a Constitution Bench with observations by Chief Justice of India (CJI) T.S. Thakur that “the issues sought to be raised are of considerable importance and public interest ...”.

When Michael Kirby, a distinguished former Judge of the High Court of Australia and a former President of the International Commission of Jurists, delivered the 2013 Tagore Law Lectures, his theme was ‘Sexual Orientation and Gender Identity — a new province of law for India’. In 1999, Justice Kirby had publicly shared with the world that he was homosexual.

Since the early 1990s, the non-profit Lawyers Collective led by Anand Grover (the lead counsel in the *Naz Foundation* case) has been in the vanguard of asserting, upholding and enlarging the rights of people living with and vulnerable to HIV, including homosexual men and transgender people.

Lawyers Collective invited Michael Kirby and Edwin Cameron (then in the Court of Appeal and now a Judge of the South African Constitutional Court) to conduct a series of judicial workshops on HIV/AIDS and related issues in the 1990s and 2000s. One of these workshops was inaugurated by former CJI J.S. Verma (then Chairperson of the National Human Rights Commission). Justice Cameron publicly revealed that he was himself both homosexual and HIV-positive. Justice Kirby describes the event:

“The effect on the audience was electric. His courage and dignity attracted respect. At the end of the session, Justice Verma publicly embraced Justice Cameron in a spontaneous gesture of solidarity and appreciation for his sharing his knowledge and experience of the epidemic with judicial colleagues in India.”

From Symbolism to Reality

This warm embrace changed from symbolism to reality when the Delhi High Court delivered its judgment on July 2, 2009 (Chief Justice A.P. Shah and Justice S. Muralidhar) decriminalising Section 377 in the case of consensual adult sex in private in the *Naz Foundation* case. LGBTQ people could breathe easier, free of the yoke of criminality. It opened up a new world of dignity, privacy and equality for them.

After enjoying this freedom for four years, five months and nine days, the Supreme Court judgment in *Suresh Kumar Koushal* (Justices G.S. Singhvi and S.J. Mukhopadhyaya) came like 'Rahu' eclipsing their rights and reversing the *Naz Foundation* judgment. If Justice Kirby and Justice Cameron were to visit India after the *Koushal* judgment, would they be treated as honoured guests or as suspected felons?

In fairness to the reader, I must disclose that I appeared in the review for *Naz Foundation* in the Delhi High Court, which was dismissed on November 3, 2004 on the ground of lack of cause of action (Chief Justice B.C. Patel and Justice Badar Ahmed). Later the Supreme Court set aside this order and remanded the matter. I also appeared in the preliminary stages in the Supreme Court in the *Koushal* case for some parents supporting Naz Foundation.

Second, I wrote an article in *The Hindu* on October 12, 2006 ("Human rights versus Section 377") where I argued that homosexual practices between consenting adults in private should be decriminalised. My article adverted to the rich jurisprudence of the European Court of Human Rights (ECHR) liberating homosexuals and lesbians. It also referred to the U.S. Supreme Court decriminalising homosexual behaviour between consenting adults in private by invalidating a Texas law while reversing its earlier decision. Justice Clarence Thomas in the dissenting minority, despite upholding the law, characterised it as "uncommonly silly" and observed: "If I were a member of the Texas legislature, I would vote to repeal it."

Third, I am the parent of a son who is homosexual.

The Curative Jurisdiction

It is an oft-repeated fallacy that the curative jurisdiction of the Indian Supreme Court can be invoked only when there is a denial of natural justice, or a person who is not a party is adversely affected, or a person who is a party is not served, or the judge is biased.

The leading judgment in *Rupa Hurra* holds: "The upshot of the discussion in our view is that this Court, to prevent abuse of its process and to cure a gross miscarriage of justice, may reconsider its judgments in exercise of its inherent power... It is neither advisable nor possible to enumerate all the grounds on which such a petition may be entertained." In fact, a curative petition was allowed in *National Commission for Women v. Bhaskar Lal Sharma*, by a Bench of three judges observing, "Accordingly it was too early a stage, in our view, to take a stand as to whether any of the allegations had been established or not... Accordingly we allow the curative petitions... and recall the judgment". This was in a case of miscarriage of justice where matrimonial disputes led to allegations

of criminal conduct. Again, in *Devender Pal Singh Bhullar's* case the curative petition was allowed, reducing the death penalty to life imprisonment on the ground that the earlier decision was per incuriam in the light of a subsequent decision. The other ground was the medical condition of Bhullar.

The *Naz Foundation* judgment declared that Section 377 in so far as it criminalised consensual adult sex in private violated Articles 21, 14 and 15 of the Constitution. It brought human rights of LGBTQ people in line with international legal norms applied in Europe, the U.S., Canada, South Africa, Australia, New Zealand, Hong Kong and Fiji among others.

The Universal Declaration of Human Rights adopted on December 10, 1948 states that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”. December 10 is Human Rights Day. Ironically, on December 11, 2013, a liberating and internationally acclaimed judgment was reversed by the Supreme Court after over four years.

A subsequent judgment delivered by the Supreme Court (Justices K.S. Radhakrishnan and A.K. Sikri) on April 15, 2014 in *National Legal Services Authority v. Union of India* recognised a third gender status for transgender people and their fundamental rights as human beings. The underlying reasoning of this judgment is wholly inconsistent with the *Koushal* judgment and a Constitution Bench is essential for resolving this conflict.

The Way Forward

Miscarriage of justice is writ large in the *Koushal* judgment. LGBTQ people are treated as “unapprehended felons” — a great blow to the doctrine of equality, privacy and dignity embodied in liberal judgments of our Supreme Court under Articles 21, 14 and 15. It has caused enormous public mischief and, as represented by the Ministry of Health, contributes to gravely exacerbating the spread of HIV.

The *Koushal* judgment diminished the high standing of Indian human rights jurisprudence. It ignored a long line of the ECHR judgments. It exhibited a total disconnect with the expanding horizon of human rights. Without being pejorative, a queer judgment on queer people has muddied the waters of India's human rights record.

The balance must be rapidly restored by institutional action of the Supreme Court. The reference of the curative petitions to a Constitution Bench is the first step in the right direction.

Lord Denning observed, “The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction you must at least be permitted to strike off in the right direction.” The pithy observation of Justice Robert H. Jackson of the U.S. Supreme Court is also worth recalling: “I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.” To conclude with the admirable words of Justice V.R. Krishna Iyer: “Horace wrote: ‘But if Homer, who is good, nods for a moment, I think it

a shame.' We, in the Supreme Court, do 'nod' despite great care to be correct, and once a clear error in judgment is revealed, no sense of shame or infallibility complex obsesses us or dissuades this Court from the anxiety to be ultimately right, not consistently wrong."

*Media –
Freedom of Speech –
Contempt*

23

Judicial Accountability and Contempt of Court

This speech was delivered on 29 December, 2001 at a seminar on 'Judicial Accountability and Contempt of Court' organised by National Law School of India University, Bangalore. It deals with judicial accountability, contempt power, the Spycatcher case and Latimer House Guidelines and the National Commission to Review the Working of the Constitution headed by Justice Venkatachaliah in relation to complaints against delinquent behaviour of judges.

1. Introduction

- 1.1 Fifty years of the working of the Constitution has brought about a sea change in the functioning and working of our democratic institutions. It is the universal perception in India that there is a steep fall in the values of public men. Increasingly the politician at the highest level is no longer what a politician used to be in the early years of our Constitution. Capturing political office is not regarded as a public service. Political power is now predominantly utilized as a road to personal and family wealth and controlling the levers of economic power.

Arun Shourie says in "Courts and their Judgments"

"Politicians have become almost wholly illegitimate, even in their own eyes, they are also less and less able to execute, to even comprehend the tasks for which they have been elected."

- 1.2 Francis Bacon, Lord Chancellor of England, when accused of bribery defended himself by saying that "his offences were the offences of the time." We are all acutely aware of the vices and offences of our times.
- 1.3 Lord Devlin observed that "judges are not now, neither have been in the past much better or much worse than other public servants." And that "integrity comes haltingly into public life and that without watchfulness it may slip away".

- 1.4 The Chief Justice of India Mr. S.P Bharucha as reported in the national dailies (The Hindu 24 December, 2001) has stated "a good majority of judges in the country are honest but there is a minority which is corrupt and should be identified and dismissed from service" . . . and "judiciary would not tolerate corruption in its ranks" . . . "while in the case of lower Courts action against corrupt judges was possible . . . it was difficult in the case of the higher judiciary since impeachment was the only recourse in law . . .". The great danger to the Rule of Law is when standards of judicial integrity progressively descend to the level of other declining standards in our society.
- 1.5 The most significant change in these fifty years is a vast accumulation of powers in the higher judiciary. Judicial intervention has taken place as a democratic necessity where other arms of Government, the Legislative and the Executive have failed to function effectively. The Earl Warren Court's activism in racial segregation issues was a sequel to the failure of the Congress and the Presidency to remedy the evil. The failure of the Indian Legislature and the Executive created a void which was filled in by judicial activism. Some of the principal reasons for the same are, first, the enormous and ever-widening field of judicial review. In the early years the leanings of the Court was to validate executive action. Later after the Fundamental Rights Case, the Supersession and during the Emergency there was an enormous increase in the power of the executive at the cost of the judiciary. The Supreme Court became pliant and submissive. After the Emergency there was an explosive enlargement of judicial power. As a perceptive author has remarked. "No sooner had the people ended the Emergency, the Supreme Court was a tiger". (Arun Shourie – Page 208 – Court and Judgments). Since the mid-eighties and the advent of public interest litigation and the liberalization of the *locus standi* rule and the *suo motu* exercise of judicial review powers by the Courts, a large slice of the power of the executive passed into the hands of the higher judiciary. Environmental cases, forest preservation cases, pollution cases, corruption cases and the great work done by the higher judiciary in these areas has enhanced its prestige and enlarged the area of judicial power. Injunctions or directions in public interest matters can displace individuals, ruin businesses, unintentionally protect well entrenched vested interests and cast shadows on the careers of bureaucrats, entrepreneurs, politicians, and unnamed classes of individuals. With the fall in standards of the executive, the power of appointment to the higher judiciary has now slipped out of the hands of the executive. Appointments, promotions and transfers of High Court Judges and appointment of Supreme Court Judges are now in the hands of a collegium of the Apex Court.
- 1.6 In other words the traditional role of a judge to adjudicate on private disputes between citizen and citizen or between citizen and governmental authorities has enlarged itself into public interest decisions affecting millions of people whose voice remains unheard. Again the higher

judiciary is now exercising diverse powers in public interest litigation, which are *basically of a quasi-legislative and administrative nature* and which were traditionally discharged by the executive. This vast accretion of powers also means an opportunity for abusing power intentionally or unintentionally. The concentration of this power is unrivalled in any democratic country governed by the Rule of Law. It is therefore imperative to find ways and means of disciplining this power both from inside the judicial family and, if that has failed (as appears to many thinking citizens), from outside the judiciary.

2. The Contempt Power

- 2.1 The Contempt Power that is of relevance to our discussion is the power not arising from disobedience of Court orders but criminal contempt in the form of scandalizing the Court. The law as it stands today tells us that (1) vigorous and robust criticism of a judgement is permitted, (2) attributing bias or motives to a judge or that he has been corruptly influenced amounts to contempt.
- 2.2 How does a citizen or the media deal with a corrupt or a biased judge because the alleged contemner cannot plead the truth ? Nor has he any avenue of making a complaint.
- 2.3 Our Supreme Court has held that there are hardly any English or Indian cases in which the defence of truth or justification has been recognized. [AIR 1971 SC 221 (230)], *Perspective Publications v. State of Maharashtra*. The reason was stated to be that if evidence was to be allowed to justify allegations amounting to contempt of court it would tend to encourage disappointed litigants and one party or the other to abuse the judge. AIR 1971 SC 1132 (1146, 1149), *C.K. Daphtary v. O.P Gupta*.

3. The Spycatcher Case

An example of robust criticism was the famous Spycatcher case. The British Government moved the Court to stop publication of a book by Peter Wright, a member of the British Secret Service. The Court of Appeal granted an injunction. The House of Lords by a majority upheld and enlarged the ban. The London Times came out with a blistering editorial. It said "Yesterday morning the law looked simply to be an ass. Those who regretted this fact were waiting with quiet confidence for the Law Lords to do something about it . . . But yesterday afternoon the law was still an ass. . . In the hands of Lords Templeman, Ackner and Brandon (the majority who ruled for the gag order) it had become unpredictable and wild seemingly responsive only to autocratic whims". The Daily Mirror came out with a front page caption "YOU FOOLS" and published the photographs of Lords Templeman, Ackner and Brandon upside down. This front page has now been immortalized as a cover in a book by Simon Lee called "Judging Judges". Bernard Levin called the judgment "Barmy" (Slang for insane) and characterized the three majority law lords as "Wynken,

Blynken and Nod". The judgement was described by others as "A dangerous piece of judicial arrogance", "a sinister threat to freedom", a "monstrous act of censorship".

4. Judges on Judges

- 4.1 Sometimes judges use strong language against their own learned brethren. In *Liversidge v. Anderson*, (1942) AC 206 Lord Atkin criticized the majority judgment in the following terms "I view with apprehension the attitude of judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive minded than the executive." He ridiculed the reasoning of the majority as that of Humpty Dumpty in Alice Through the Looking Glass.
- 4.2 In another famous case Quintin Hogg (later Lord Chancellor Lord Hailsham), a Member of Parliament in an issue of "Punch" on February 14, 1968, attacked the Court of Appeal in England in strong language. He said "the recent judgment of the Court of Appeal is a strange example of the blindness which sometimes descends on the best of Judges". Lord Denning held it was not contempt.
- 4.3 American judges have been traditionally very forthright and unsparing of their colleagues. In America the First Amendment protection of free speech is venerated. Justice Rehnquist of the US Supreme Court (later Chief Justice) in one of his dissents described the majority reasoning as "reminiscent not of jurists such as Hale Holmes and Hughes but of escape artists such as Houdini (the conjurer)". US Supreme Court Justice Jackson described his colleague Justice Black as a "stealthy assassin" whose disregard of judicial proprieties threatened to bring the court into disrepute. The most publicised exchange as described by Bernard Schwartz in the US Supreme Court occurred on April 24, 1961 in a packed court room. Justice Frankfurter while delivering his dissenting judgment attacked the majority opinion as an "indefensible example of judicial nit-picking". Chief Justice Warren angrily said "this was not the dissenting opinion that was filed . . . As I understand it, the purpose of reporting an opinion in the Court room is to inform the public and is not for the purpose of degrading this court".

5. Latimer House Guidelines

- 5.1 At joint meetings of representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers Association and the Commonwealth Legal Education Association held at Latimer House (U.K.) from June 15 to June 19, 1998 certain principles and guidelines were formulated.
- 5.2 This was in pursuance of the Harare principles and the Millbrook Commonwealth Action programme. The principles were seen as essential for good governance, promoting human rights and the rule of law and preserving the independence of the judiciary.

5.3 Part V deals with judicial and parliamentary ethics. It *inter alia* states “Judicial Ethics”

(a) A Code of Ethics and Conduct should be developed and adopted by each judiciary as a *means of ensuring the accountability of judges*.

5.4 Part VI (Accountability Mechanisms) deals with judicial accountability. It *inter alia* states:

(b) “Public Criticism”

(i) *Legitimate* public criticism of judicial performance is a means of ensuring accountability:

(ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting *legitimate* criticism of the courts.

5.5 In this connection at the 12th Commonwealth Law Conference held at Kuala Lumpur (13/16 September, 1999) the Seven principles of public life identified by Lord Nolan’s British Committee on Standards in Public Life namely selflessness, integrity, objectivity, accountability, openness, honesty and leadership were recalled by many participants. Chief Justice Gubbay of Zimbabwe in a thoughtful paper in the above Conference said about Judicial Accountability:

“The Latimer House guidelines deal with this important facet of judicial independence under the two headings (a) discipline and (b) public criticism.

.....The guidelines point to the need to remove a judge on the grounds of inability to perform judicial duties and serious misconduct..... The point is also made that *public criticism of judicial performance is a means of ensuring accountability* and that legitimate criticism is not to be restricted by *recourse to contempt proceedings*”.

He also said:

“Accountability is also secured through *a vibrant media and a critical academia*”.

6. The Indian Judiciary

6.1 Let us examine, what the Supreme Court itself has stated about the judicial function and judicial powers. In the controversy arising out of allegations of corruption against former Chief Justice Veeraswamy of the Madras High Court it was observed “the judiciary has no power of the purse or the sword. It survives only by public confidence and it is important to the stability of the society that the confidence of the public is not shaken. The Judge whose character is clouded and whose standards of morality and rectitude are in doubt may not have the judicial independence and may not command confidence of the public”. (1991) 3 SCC 655 (705) para 53.

6.2 Professor Jackson in his Machinery of Justice observed “ Misbehavior by a Judge, whether it takes place on the Bench or off the Bench undermines public confidence in the administration of justice and also

damages public respect for the law of the land; *if nothing is seen to be done about it the damage goes unrepaired.*" (1991) 3 SCC 655 (705-706) Para 5.

- 6.3 The controversy arising from allegations against the former Justice V. Ramaswamy of the Supreme Court led to a proliferation of judgments. The Supreme Court quoted with approval "the standard of conduct (judicial) is higher than that expected of lay people and also higher than that expected of attorneys. The ultimate standard must be conduct which constantly reaffirms fitness for the high responsibilities of judicial office and judges must so comport themselves as to dignify the administration of justice and deserve the confidence and respect of the public . . . In fact even in his private life a judge must adhere to standards of probity and propriety higher than those deemed acceptable for others: (1991) 4 SCC 699 (756), *Sub-Committee on Judicial Accountability v. Union of India*.
- 6.4 Again in (1992) 4 SCC 506 the Court cited with approval at page 565, 566 Raoul Berger stating "When two principles come in conflict with each other, the Court must give them both a reasonable construction, so as to preserve them both to a reasonable extent".
- 6.5 In the case arising from the resignation of a former Chief Justice of the Bombay High Court *C. Ravichandran Iyer v. Justice Bhattacharjee*, (1995) 5 SCC 457 a two judge Bench of the Supreme Court commenting upon the standard of conduct of a judge stated that "judicial office is essentially a public trust. Society is therefore entitled to expect that a judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venal influences. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court, would be deleterious to the efficacy of judicial process. *Para 21 at page 473*.
- 6.6 "To keep the stream of justice clean and pure, the Judge must be endowed with sterling character, impeccable integrity and upright behaviour. Erosion thereof would undermine the efficacy of the rule of law and the working of the Constitution itself". *Para 23 at page 474*.
- 6.7 The judgment then goes on to say in para 40 at page 481 how complaints should be made. In sum, the complaints by the Bar have to be made to the Chief Justice of the High Court if it relates to the Judge of the High Court.
- 6.8 To say the least the procedure suggested is wholly inadequate, impractical and has proved to be ineffective.

7. The Issues

- 7.1 The issues I propose to raise in my address are, firstly, the need for providing a mechanism for dealing with complaints against judges of the higher judiciary namely the High Court and Supreme Court.
- 7.2 Secondly, the need for changes in the law of contempt to encourage public criticism and bring out biases of the judges and to protect

citizens making complaints in a structured and confidential manner while ensuring immunity from the law of contempt and defamation if such complaints are made in the manner permitted and prescribed.

- 7.3 Thirdly, a Judicial Code of Conduct to be debated and crystallized by the higher judiciary itself and availability to the public of the same.
- 7.4 Fourthly, drawing a legal framework which enables the disclosure of assets of the members of the higher judiciary with access to the media and public of such filings which will act as a deterrent to financial corruption.

8. The Review Commission

The Review Commission on the Constitution in its Consultation Paper relating to the Superior Judiciary has examined the topic in Part IV entitled *"Procedure for dealing with deviant behaviour and for Removal"*.

The points made by the Review Commission may be summarised as under:

- The Constitution provides the procedure for removal of Judges of the High Court and the Supreme Court. It does not provide for deviant behaviour not amounting to "proved misbehaviour" (Para 14.1).
- The performance of the higher judiciary in India is extremely gratifying and admirable. It has produced brilliant and extraordinary Judges but there have been some exceptions and *in recent years more such exceptions are coming to light*.
- There has been of late *public concern over judges behaving in an un-judge like manner*. It is these few persons whose conduct calls for disciplinary action so as to preserve the fair name of the judiciary. (para 14.3).
- The impeachment process envisaged in Article 124 *has practically become unrealistic* and standards have to be evolved to determine "proved misbehaviour" and to determine what is "undesirable behaviour" not amounting to "proved misbehaviour" (para 14.4).
- Tentatively "proved misbehaviour" means an act which could be an offence under the Prevention of Corruption Act, 1988 or an act which amounts to an offence involving moral turpitude or offence under section 121 to 124A, 153A, and 153B of the Indian Penal Code. Other undesirable acts may be treated as "conduct unbecoming of a judge" but not amounting to misbehaviour (Para 14.5).
- It has become necessary to prescribe some procedure for this kind of bad behaviour or deviant behaviour (Para 14.5).
- There are some complaints that some Judges even Chief Justices are not seen to keep a distance from centers of political powers. (Para 14.5)
- Though there are not many cases of deviant behaviour but few are fouling the atmosphere.
- The exercise of the power to punish for contempt of court *increasingly has been seen as a means of suppressing all criticism* (Para 14.5).

- The present procedure of impeachment is totally inadequate and impractical (Para 14.6).
 - According to parliamentarians/legislators and other holders of high executive offices a 'nice' judge is one who can be approached by them in matters of their interest (Para 14.6).
 - Some effective measures ought to be evolved to rectify the above situation (14.6.1).
 - *The present solution of the only and extreme remedy of removal has become impractical and being a political process* is not in the larger interest of the judiciary (Para 14.10).
 - A procedure akin to the one obtaining in the USA is suggested for further discussion (Para 14.7 and para 14.11).
- 8.1 The core suggestion in the Consultation paper is a three step machinery providing an effective measure to deal with "misbehaviour" and also deviant behaviour (Para 14.6.1). The first step is a scrutiny by the Chief Justice of India and four senior most judges of the Supreme Court of a complaint of deviant behaviour and also complaints of misbehaviour and incapacity. Scrutiny would be to ascertain whether there is a *prima facie* case calling for a fuller investigation and inquiry. The second step envisaged is a reference for a full inquiry to the Committee constituted under the Judges Inquiry Act, 1968. The Committee would be a permanent Committee and not one constituted for a particular case as is the present position under section 3 of the Act. The permanent Committee should be constituted by the President on the advice of the Chief Justice of India. The Committee is to inquire into the allegation in accordance with the procedure prescribed by the Act and submit its report to the Chief Justice of India (Obviously this will require both an Amendment to the Constitution and an Amendment to the Act.) A result devoutly to be wished but well beyond practical possibility as it will involve eschewing of the power of the House to move a motion and of the Speaker to appoint the Committee. The third step is presented as an alternative (Para 14.8) Either the present method of removal by Parliament to continue *or* the report be considered by all members of the Supreme Court. The decision as to the punishment or otherwise to be arrived at by 2/3 of the judges of the Supreme Court present and voting plus a simple majority of the total effective strength of the Court (Not sanctioned strength).
- 8.2 The procedure is to apply equally to the judges of the Supreme Court except that the judge against whom the complaint is received or inquiry ordered shall not participate.
- 8.3 It is assumed but not clarified in the Review Commission's paper that if the complaint is against the Chief Justice of India the next senior-most judge will discharge the functions of the Chief Justice of India.
- 8.4 The above core suggestion is based on three or four fundamental postulates. First, that the impeachment remedy is impractical. Second,

it is predominantly a political process which is not in the larger interest of the judiciary. Three, the process distances the executive and legislative arms from the judiciary and protects the independence of the judiciary.

9. Comments on the Discussion Paper of the Review Commission

- 9.1 The first thing which strikes any student and observer is that the ground realities which are within the public domain have been disregarded in the Consultation Paper. The public and the citizen are acutely aware of recent controversies regarding serious charges against sitting judges. The facts regarding the Veeraswamy case, the Ramaswamy case and the Bhattacharjee case are all available in Supreme Court decisions. In addition, the members of the Commission have not addressed themselves to the fact that today the Bar, the media and the citizen have no avenue of making a complaint against misconduct or deviant conduct by sitting judges. They do so at the peril of being hauled up for contempt. Under our Constitution Article 19(1)(a) guarantees freedom of speech and expression. But it is subject to reasonable restrictions in the interests of contempt of court or defamation. The Attorney-General for India is reported to have stated (The Hindu 19.12.1999) "chances for detection and exposure of corruption in the judiciary are slim unless the law of contempt is amended. . . The law of contempt needs to be amended to make it compatible with public interests". Not only is the law of contempt required to be amended but both the Supreme Court and High Courts inherent powers of contempt (which are now well settled under Supreme Court judgments) will have to be looked at and, if necessary, circumscribed by an amendment to the Constitution. A mere parliamentary statute may not be adequate.
- 9.2 When the Courts are exercising *quasi*-legislative and administrative powers in their judgments apart from mere adjudication of a 'lis' why should the citizen be debarred from attacking such decisions on the ground of bias, collateral motives and even extraneous considerations? The citizen is entitled to direct vigorous criticism against a similar action by a legislator or Minister. Why should not a judge essentially exercising quasi legislative or administrative power be not subject to the same rule and criticism? Why is not truth and justification and fair comment (which does not involve *mala fides* or recklessness) be a permissible defence against the charge of contempt? The Phillimore Committee in England had suggested such a course provided it was for the public benefit.
- 9.3 If a proper mechanism is put in place (with confidentiality assured) and complaints against sitting judges are protected from the contempt power and defamation suits, much can be achieved. Though the Review Committee has suggested a mechanism there is not a word about protecting the complainant. This issue has to be immediately addressed.

- 9.4 Again the procedure suggested is further concentrating all powers in the higher judiciary and in the collegium of five judges. A further accretion of power in the apex court. Looking to the nature of public controversies regarding two Chief Justices of India in the recent past, a fresh and indepth look is essential. Should not the disciplinary power be reposed not in the five senior judges but in some other permanent institution consisting of sitting judges or retired judges themselves with some participation from the Bar and the citizen. Once a sitting Judge accepts the assignment he should not go back and function as a Judge but would be permanently committed to his duties of such office. This means a "*Judicial Ombudsman*" consisting predominantly of the judicial element. It is essential that the enlarged defence of fair comment in defamation cases should equally be made applicable in the criminal contempt jurisdiction. This is a delicate matter and a sensitive subject which requires in-depth study and which is an issue not addressed by the Review Commission.
- 9.5 A law relating to disclosure of assets of members of the higher judiciary is essential. The Ethics in Government Act in the United States is a model worth considering. Easy access to the public to such filings would itself act as a great deterrent to misbehaviour. Lastly a judicial Code of Conduct along the lines of the Judicial Code of Conduct adopted by other countries is a must. In this connection the very weak guidelines suggested by the Commonwealth Law Association in the Latimer House Guidelines and the American Bar Association's Model Judicial Code of Conduct would serve as norms to be adapted and strengthened to meet Indian conditions.
- 9.6 I think the Consultation Paper is a good starting point for debate and discussion. But a more intensive in-depth research and study and recommendations which can be quickly implemented in a practical manner is the need of the hour to protect the public interest in maintaining purity in the administration of justice.
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Limited by Law

This article was published in The Indian Express on 8 January, 2002. It deals with the contempt power and complaints against a dishonest judge. This article was written prior to an Amendment Act (17 March, 2006) by which the defence of truth was inserted in the Contempt of Courts Act, 1971.

Over 50 years of the working of the Constitution have brought about a radical change in our democratic institutions. There is a steep fall in the values of public men. Capturing political office is not for public service but for personal gain. In his book *Courts and Their Judgments*, Arun Shourie says, "Politicians have become wholly illegitimate, even in their own eyes."

One of the most visible changes is a vast accumulation of powers in the higher judiciary. These powers are on occasion quasi-legislative or administrative. Judicial review has immeasurably enlarged the powers of the higher judiciary. The measure is only the judge's sense of self-restraint.

Such concentration of power in the judiciary is unique and unrivalled in any democratic country governed by the rule of law. But how is this awesome power disciplined? If abused it may pose a threat to the rule of law itself. The review commission headed by former Chief Justice Venkatachaliah states in a consultation paper that of late there is public concern over judges behaving in an unjudge-like manner and such conduct calls for a disciplinary system.

How does a citizen make a complaint against a dishonest judge? Is he liable for contempt even if the allegations are true? This grey area needs to be urgently addressed.

Recently, the Chief Justice of India, as reported in national dailies, stated: "A good majority of judges in the country are honest but there is a minority which is corrupt and should be identified and dismissed from service... judiciary would not tolerate corruption in its ranks... While in the case of lower courts action against corrupt judges was possible... it was difficult in the case of higher judiciary since impeachment was the only recourse in law."

Francis Bacon, Lord Chancellor of England, when accused of bribery, defended himself by saying his "offences were the offences of the time". We are

all aware of the vices and offences of our times. Speaking of the English judge, Lord Devlin observed that “judges are not now, neither have been in the past, much better or much worse than other public servants” and “integrity comes haltingly into public life and without watchfulness may slip away”.

How does a watchful citizen make a complaint against a dishonest judge? Is he liable for contempt even if the allegations are true? Is there any mechanism by which a credible, responsible complaint can be examined? As the law of contempt stands today, vigorous and robust criticism of a judgment is permitted but attributing bias, motive or corruption to a judge amounts to contempt of court. Truth or justification is no answer to a charge of contempt. The reason given is, if evidence was to be allowed to prove the truth, it would expose the judge to allegations from disappointed litigants and the public. The trial would itself damage the judge and the judiciary.

An example of robust criticism in England is the famous Spycatcher Case. The British government moved the court to stop publication of a book by Peter Wright, a member of the British Secret Service. The Court of Appeal granted an injunction. The House of Lords by a majority upheld and enlarged the ban. The London Times came out with a blistering editorial: “Yesterday morning the law looked simply to be an ass. Those who regretted this fact were waiting with quiet confidence for the Law Lords to do something about it... But yesterday afternoon the law was still an ass... In the hands of Lords Templeman, Ackner and Brandon (the majority who ruled for the gag order) it had become unpredictable and wild, seemingly responsive only to autocratic whims.” *The Daily Mirror* came out with a front page caption, “you fools”, and published photographs of the trio upside down.

American judges have been traditionally very forthright and unsparing of their colleagues. Justice Rehnquist of the US Supreme Court (later Chief Justice) in one of his dissents described the majority reasoning as “reminiscent... of escape artists such as Houdini (the conjurer)”.

All over the world there is a movement towards a more accountable judiciary and a wider scope for criticism of the judiciary. The Commonwealth Law Association has framed the Latimer House guidelines. It visualises a code of judicial ethics. The American Bar Association code of conduct for the judiciary is widely accepted. The Phillimore Committee in England has recommended truth as a defence to contempt if it is for the public benefit.

Unlike the law of contempt, the law of defamation always permitted the defence of justification or truth. But if truth was not established the defendant would be liable. In the US, however, public men on public issues could be criticised. The media or the citizen would not be liable even if the allegations were not true, provided the publisher acted in good faith and not recklessly and relied on responsible sources. The above defence is now available in India in defamation cases as our Supreme Court has adopted the enlarged American defence. This gives great freedom to the media and the public to criticise public officials and politicians.

But what about judges? Barring the impractical and “failed” impeachment process there is no avenue even for legitimate criticism against a dishonest judge. A publication which can be justified cannot be contrary to the motto “truth alone triumphs” (*Satyameva Jayate*) which adorns the Supreme Court. Truth makes a dishonest judge contemptible but ought not to bring the court into contempt.

In a case involving Chief Justice Veeraswamy of the Madras High Court the Supreme Court has directed that no criminal case for corruption should be registered and no sanction to prosecute a High Court or Supreme Court judge be given without the consent of the Chief Justice of India. This judgment enables the Chief Justice to activate investigation by the appropriate authority when he is satisfied *prima facie* for its need.

To meet the “felt necessities” of the times new court-framed guidelines are essential. Fair comment and justification as applicable to the law of defamation need to be woven into the contempt jurisdiction. Properly structured complaints should be entertained by the apex judiciary without fear of contempt proceedings or defamation. Confidential non-participatory procedures will not command credibility.

Justice Shetty in the Veeraswamy case observed: “We must never forget that this court is not a court of limited jurisdiction of only dispute settling. Almost from the beginning, this court has been a law-maker. Indeed the court’s role today is much more. It is expanding beyond dispute-settling and interstitial law-making. It is a problem solver in nebulous areas. In this case, we consider it no mere opportunity, it is a duty.”

The law of contempt is a nebulous area and the problem needs to be urgently addressed. The damage caused by a dishonest judge should not go unrepaired. If a credible mechanism is put in place quickly and firmly, it will greatly disarm the growing perception of an unaccountable judiciary.

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Press and Privacy

This paper was presented in a seminar on “The Future of India and Role of Media” held on 16 November, 2002 by the Press Council of India. It discusses the tension between the right to disseminate the news and privacy of individuals and the UK experience of the Press Complaints Commission (an independent body voluntarily set up by the Press as a matter of self-regulation). It also deals with the right to privacy in Indian law and the Press Council of India and its powers.

1. The Press and Print Media have enormous power. All democratic constitutions in the world have enshrined the freedom of the Press as a basic right. Article 19(1)(a) of our Constitution guarantees the freedom of speech and expression as a fundamental right. This has been interpreted to include the Freedom of the Press. The importance of the freedom of the press should in no way be diluted. Thomas Jefferson said “Our liberty depends on the freedom of the Press and that cannot be limited without being lost”.
2. Traditionally in medieval times political power was shared by the three estates namely, the Nobles, the Clergy and the Commons. In England the three estates were the Lords Spiritual, the Lords Temporal (constituting the House of Lords) and the Commons. But with increasing technology and the power of the press a “fourth estate” namely ‘The Press’ was born. This appellation is symbolic of the great power now wielded by the Press.
3. And yet this power can come in conflict with the individual citizen’s privacy. The press has two major areas of tension and conflict. It comes into conflict with government and governmental authority whether legislative, executive or administrative.

It also comes into conflict with the individual rights of the citizens including the right to privacy. Samuel Johnson said “The liberty of press is a blessing when we are inclined to write against others and a calamity when we find ourselves overborne by the multitude of our assailants”

4. This brief article discusses some issues arising from this conflict and the tension between the Press and the individual and refers to some of the measures which have been taken to protect the right of the individual citizen in other countries.
5. An unique institution was founded in the U.K. called the Press Complaints Commission. (PCC). The PCC is an independent body which deals with complaints from members of the public about publications in newspapers and magazines. The PCC is independent of the newspaper industry [though founded by it through an arms-length mechanism] and the government and discharges no statutory functions. It gives decisions which are voluntarily published by the offending publications. It does not award monetary compensation or fines. The PCC publishes its own adjudications.
6. At a seminar recently held in February, 2002 in Sri Lanka sponsored by the Commonwealth Press Union (CPU) the topic of Press Complaints Commission being set up in other countries was discussed at length. The Press Freedom Director of the CPU Ms. Lindsay Ross and Prof. Robert Pinker Acting Chairman and Privacy Commissioner of the PCC eloquently and concisely explained the philosophy and the working of the PCC in UK. The functioning of the PCC is discussed in detail later in this article.

Right to Privacy in the Indian Context

7. There is no specific and express constitutional provision or statutory right of privacy in India. By judicial decisions the right to privacy has been developed from the fundamental right guaranteed in Article 21 which reads as under:

"No person shall be deprived of his life or personal liberty except according to procedure established by law".
8. By judicial decisions the right of privacy has been held to be a part of the right to life and personal liberty embodied in Article 21. The first case was *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295. In this case certain surveillance activities and regulations made by the police were invalidated. The Court following American decisions read the word 'LIBERTY' as comprehensive enough to include privacy. The leading American decisions *e.g.*, *Wolf v. Colorado*, 338 US 25; *Griswold v. Connecticut*, 381 US 479 and *Roe v. Wade*, 410 US 113 were broadly followed.
9. In the next case *Gobind v. State of Madhya Pradesh*, (1975) 2 SCC 148 the principle was reaffirmed and it was mentioned that the right of privacy will necessarily have to go through a process of case by case development. Article 8 of the European Convention of Human Rights was also referred to.
10. In a recent case *PUCL v. Union of India*, (1997) 1 SCC 301, the tension between the right to privacy and telephone tapping was discussed in depth. The Supreme Court laid down guidelines to safeguard the

privacy of citizens against arbitrary, excessive and uncontrolled telephone tapping.

11. In *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632 the right of privacy was discussed. This is a landmark judgment. In this case a magazine desired to publish the autobiography of a murder convict who had written his autobiography in jail which revealed the nexus between Government Officers and the prisoner. The police authorities tried to prevent it. The action of the authorities was challenged in Court. Two broad questions arose. The right to publish of the press and the right to privacy. The Court laid down broad principles regarding the right to privacy. The Court also brought the Indian Law in line with principles laid down in the leading case on defamation namely *New York Times Co. v. Sullivan*, 376 US 254 and the English Case *Derbyshire v. Times*, (1993) 1 All ER 1011. It was held that the press had immunity from defamation and the publication would be protected in case of public officials relating to discharge of their official duties even though the facts and statements were untrue. Unless the official establishes that the publication was made with reckless disregard for truth and was actuated with malice. The press had to prove that the publication was made only after reasonable verification of facts. This leading case is a great blow for Press Freedom and is a seminal judgment on the freedom of the press in a country like India where corruption and financial scams are rampant.
12. A felicitous description of the meaning of the word privacy bears repetition. Justice Mathew in *Gobind v. State of Madhya Pradesh*, (1975) 2 SCC 148, para 24 observed that any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing.

The Press Council of India

13. The Press Council of India under the Press Council Act, 1998 is enjoined "to preserve the freedom of the press and to maintain and improve the standards of newspapers and news agencies". Under Section 13(2)(b) one of its functions is to build up a Code of Conduct of newspapers, news agencies and journalists in accordance with high professional standards. Under Section 14 the Press Council can entertain complaints when the press has offended the standards of journalistic ethics or public taste or a journalist has committed professional misconduct. Power of the Council is limited to warning, admonishing or censuring. The Council may require a newspaper or news agency etc., in the public interest to publish particulars relating to any inquiry. Section 15(2) protects the press and journalists from disclosing his source to the Council.
14. The Press Council has over a period of years built up a Code of Ethics called "Norms of Journalistic Conduct". The Norms include various parameters and contain guidelines in relation to privacy as under:
 - "6. (i) The press shall not intrude or invade the privacy of an individual unless outweighed by genuine over-riding public interest, not being a prurient or morbid curiosity. So, however, that once a matter

becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by the press and the media among others.

Explanation.—Things concerning a person's home, family, religion, health, sexuality, personal life and private affairs are covered by the concept of PRIVACY excepting where any of these impinge upon the public or public interest.

- (ii) *Caution against identification.*—While reporting crime involving rape, abduction or kidnap of women/females or sexual assault on children, or raising doubts and questions touching the chastity, personal character and privacy of women, the names, photographs of the victims or other particulars leading to their identity shall not be published.
 - (iii) Minor children and infants who are the offspring of sexual abuse or 'forcible marriage' or illicit sexual union shall not be identified or photographed."
15. In relation to recording of interviews and phone conversations, the norms nos. 16, 17 and 18 provide for the persons knowledge or consent and exclusion of offensive language. Similarly, there are norms relating to obscenity and vulgarity. There are also norms relating to investigative journalists, which *inter alia* state that the private life even of a public figure is his own and Confidential sources should be respected.

UK PRESS COMPLAINTS COMMISSION (PCC)

16. In England the David Calcutt Committee on privacy and related matters gave its report in 1990. This was in response to a widespread public feeling that the press had become over-intrusive, was behaving in an irresponsible manner by impinging upon the individual rights and the press needed to be regulated by law. This Committee was of the view that the private life of a public figure could be subject to revelations in the press only to protect public health or public safety, or to expose crime or serious anti-social conduct or which adversely affected the public duties of a public figure because of his behavior in private life. This Committee dealt with the right of an individual to be protected against intrusion into his personal life or affairs or publication of information in relation to public figures. The Committee recognized that there was no simple criterion as to what amounts to a justifiable intrusion into an individual's privacy. It recognized that public figures could not enjoy the privacy which a non-public figure was entitled to. However there were areas where even public figures required to be protected.
17. The PCC was set up as an independent body voluntarily by the Press as a matter of self regulation. It was a reaction and response to the report of the David Calcutt Committee. A Code of Practice was drafted with inputs from Editors containing 16 clauses covering four main aspects - Accuracy, Privacy, Methods of news gathering and Vulnerable members of the society. PCC does not deal with matters which are the subject of legal proceedings or with contractual disputes or with advertisements promotions and competitions.

18. Out of the total complaints received by the PCC the majority dealt with inaccuracy. About 10% related to complaints against the invasion of privacy by journalists.
19. The focus of the present article is on privacy related complaints. The PCC Code of Practice which relates to privacy are as under:

Clause 3 Privacy

- (i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent.
- (ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable.

Note – Private places are public or private property where there is a reasonable expectation of privacy.

Clause 4 Harassment

- (i) Journalists and photographers must neither obtain nor seek to obtain information or pictures through intimidation, harassment or persistent pursuit.
- (ii) They must not photograph individuals in private places (as defined in the note to Clause 3) without their consent; must not persist in telephoning, questioning, pursuing or photographing individuals after having been asked to desist; must not remain on their property after having been asked to leave and must not follow them.
- (iii) Editors must ensure that those working for them comply with these requirements and must not publish material from other sources which does not meet these requirements.

Clause 5 Intrusion into grief or shock

In cases involving grief or shock, enquiries must be carried out and approaches made with sympathy and discretion. Publication must be handled sensitively at such times, but this should not be interpreted as restricting the right to report judicial proceedings.

Clause 6 Children

- (i) Young people should be free to complete their time at school without unnecessary intrusion.
- (ii) Journalists must not interview or photograph children under the age of 16 on subjects involving the welfare of the child or of any other child, in the absence of or without the consent of a parent or other adult who is responsible for the children.
- (iii) Pupils must not be approached or photographed while at school without the permission of the school authorities.
- (iv) There must be no payment to minors for material involving the welfare of children nor payment to parents or guardians for material about their children or wards unless it is demonstrably in the child's interest.

- (v) When material about the private life of a child is published, there must be justification for publication other than the fame, notoriety or position of his or her parents or guardian.

Clause 7 Children in sex cases

- (i) The press must not, even where the law does not prohibit it, identify children under the age of 16 who are involved in cases concerning sexual offences, whether as victims or as witnesses.
- (ii) In any press report of a case involving a sexual offence against a child—
 - (a) The child must not be identified.
 - (b) The adult may be identified.
 - (c) The word “incest” must not be used where a child victim might be identified.
 - (d) Care must be taken that nothing in the report implies the relationship between the accused and the child.

Clause 8 Listening devices

Journalists must not obtain or publish material obtained by using clandestine listening devices or by intercepting private telephone conversations.

Clause 9 Hospitals

- (i) Journalists or photographers making enquiries at hospitals or similar institutions must identify themselves to a responsible executive and obtain permission before entering non-public areas.
- (ii) The restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.

Clause 10 Reporting of Crime

- (i) The press must avoid identifying relatives or friends of persons convicted or accused of crime without their consent.
- (ii) Particular regard should be paid to the potentially vulnerable position of children who are witnesses to, or victims of, crime.

This should not be interpreted as restricting the right to report judicial proceedings.

Some Cases in UK decided by the PCC

- 20. Miss Cilla Black complained to the PCC that the photographs accompanying an article headlined “Surprise Surprise! Its Cilla Topless” published in the Sunday Sport on 17th June 2001 intruded on her privacy. The photographs were taken while Miss Black relaxed on the terrace of her home in Spain which was not a public place and no passerby could overlook. That is why she was sunbathing “topless”

The complaint was upheld by the PCC because Miss Black was in a place where she had a reasonable expectation of privacy. There was no public interest or consent to the publication.

Miss J.K. Rowling (the famous creator of the Harry Potter series) complained that the photographs of her daughter were published in

OK ! magazine which intruded into her daughters' privacy in violation of clause 3 and 6 of the Code. The photographs were taken on a beach in Mauritius while Miss Rowling and her companion were on a holiday. The photo journalist used a "long-lens". The editor denied any breach of the Code because all beaches in Mauritius were public by law.

The complaint was upheld by the PCC. It held that Ms. Rowling had consistently protected her daughters' privacy, that it affected the daughters welfare, that the daughter became vulnerable to comments from her peers (children in school with her).

Another case involved the well-known actress Ms. Naomi Russell. An article in the Sunday Sport on 11 November 2001 was headlined "Naomi's head went bob-bob-bobbie on my nobbie". She complained of breach of clause 3 (Privacy). The article contained her previous relationship with Paul Deighton. The newspaper's defence was that Ms. Russell had sought to gain publicity in the past through media interviews giving facts about her private life to further her career and increase her earning potential. Therefore Mr. Paul Deighton was entitled to earn income by discussing his private life with the media.

The complaint was upheld. The story was salacious and intrusive. There was no element of public interest nor was there any consent.

21. Today the litigation scene in India is pathetic. Because of high court fees tort actions are a non-starter. Even in defamation cases the victim files a suit mainly for an injunction because a trial with appeals etc., will not conclude within any reasonable span of time. The citizen therefore is without a remedy when the press invades an individual citizen's privacy or writes inaccurately about him.
 22. If the Indian national newspapers particularly the English Press start a mechanism like a voluntary press complaints commission it would be a first step in doing justice to the citizen by the Press itself when it has done a wrong. Today the reading public is cynical about the accuracy of Press Publications. If an effective self regulatory machinery is evolved the credibility of the Press will improve. The essence of the PCC or a similar mechanism is first, an independent body, quick and free disposal of complaints by trained Complaint's Commissioners, a voluntary and adequate publication by the offending newspaper and the appointment to the PCC of persons with high integrity and moral standing in the community. The first step is always difficult but once it is taken the credibility, status and respect the Press and the print media commands today will be immeasurably enhanced.
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Journalism, Ethics and Society in the Age of Globalization— Media and Confidentiality of its Sources

This article was published by the Press Council of India in its Souvenir on 16 November 2006. It covers English cases, the European Convention on Human Rights and confidentiality of media sources.

INTRODUCTION

- 1.1 Recent cases in the US of media reporters being sentenced for not disclosing their sources has brought to centrestage the issue of confidentiality of sources.

The classic scoop was on the *Watergate Scandal* (17 June 1972) by two intrepid journalists Bob Woodward and Carl Bernstein reporting in Washington Post. The whole Nixon administration collapsed and criminality at the highest echelons of government was exposed. Their source was “Deep Throat” – the most celebrated of all “Whistle-Blowers”. The secret was kept for over 30 years and was revealed only in 2005 when “Deep Throat” himself (Mark Felt, Deputy Director FBI) came out in public at age 91.

- 1.2 This article while generally dealing with the freedom of the media and the evolving international standards primarily focuses on the law relating to confidentiality of a journalist’s sources.

FREEDOM OF SPEECH: A PREFERRED RIGHT

- 2.1 India prides itself as the largest democracy in the world. The freedom of speech and expression is a vital part of democratic functioning and good governance. The battle between Kingly authority and the Press started in England as early as the seventeenth century. The advent of the industrial revolution and the printing press enabled wide

dissemination of news, views and criticism of governmental bodies. The tension between the pen and the sword increased.

- 2.2 In the celebrated case of *Near v. Minnesota*, 283 US 697 (1931): 75 L Ed 1357 the US Supreme Court invalidated a statute imposing previous restraint on publication as an infringement of the liberty of the Press. Some passages from the judgment are worth recalling.

“The liberty deemed to be established was thus described by Blackstone: “The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published”. [75 L Ed 1357 (1366)]

“Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression”. [75 L Ed 1357 (1368)]

- 2.3 The seminal case of *New York Times v. Sullivan*, 376 US 254 (1964): 11 L Ed 2d 686 was a great step forward and revolutionized the law in protecting free press in regard to public officials on public issues. Even though the journalistic report was false that furnished no ground for holding the media guilty of a libel. A very high standard was laid down for the plaintiff public official to succeed. Not only the plaintiff had to prove that the allegation was false but further that the media had knowingly and recklessly printed false information - a standard very difficult to fulfill. A series of cases following *New York Times v. Sullivan* has broadened the protection of journalists and the media to include ‘public figure’.

2.4 Sedition

During the conflict between the English Kings and the Press any writing which was critical of the King and his ministers was termed as a ‘seditious libel’. A ‘Catch-all’ phrase to suppress the freedom of speech and expression. During British Rule ‘sedition’ or ‘seditious libel’ was widely used by the British Rulers to prosecute nationalist leaders like Mahatma Gandhi and Bal Gangadhar Tilak. All dissent was suppressed under the vague label of ‘Sedition’.

2.5 The Constituent Assembly: Sedition

Draft Article 13 (relevant portion) of the Constitution (later Article 19) was as under:

"13. *Protection of certain rights regarding freedom of speech, etc.*—(1) Subject to the other provisions of this article, all citizens shall have the right—

(a) to freedom of speech and expression;...

(2) Nothing in sub-clause (a) of clause (1) of this article shall affect the operation of any existing law, or prevent the State from making any law, relating to libel, slander, defamation, *sedition* or any other matter which offends against decency or morality or undermines the authority or foundation of the State."

- 2.6 During the debate on Draft Article 13 (later Article 19) One of the grounds on which freedom of expression could be curtailed was 'sedition' and during the debates (C.A.D. Vol. 7, Pages 731-733) K.M. Munshi objected to the retention of 'sedition',

"**Shri K.M. Munshi** : I was pointing out that the word 'sedition' has been a word of varying import and has created considerable doubt in the minds of not only the members of this House but of Courts of law all over the world..... A hundred and fifty years ago in England, holding a meeting or conducting a procession was considered sedition. Even holding an opinion against, which will bring ill-will towards Government, was considered sedition once. Our notorious Section 124-A of Penal Code was sometimes construed so widely that I remember in a case a criticism of a District Magistrate was urged to be covered by Section 124-A.....As a matter of fact the essence of democracy is criticism of Government. The party system which necessarily involves an advocacy of the replacement of one Government by another is its only bulwark;This amendment therefore seeks to use words which properly answer to the implication of the word "Sedition" as understood by the present generation in a democracy and therefore there is no substantial change; *the equivocal word 'sedition' only is sought be deleted from the article.* Otherwise an erroneous impression would be created that we want to perpetuate 124-A of the I.P.C. or its meaning which was considered good law in earlier days. Sir, with these words, I move this amendment". (**Emphasis supplied**)

Ultimately the word 'sedition' was dropped.

- 2.7 It was the view of the Constituent Assembly that freedom of the press was implicit in freedom of speech and expression. This view has been vindicated by the Supreme Court of India. In a series of decisions from 1950 onwards the Supreme Court has ruled that Freedom of the Press is implicit in the guarantee of freedom of speech and expression in Article 19(1)(a) of the Constitution. [*Romesh Thappar v. State of Madras*, AIR 1950 SC 124; *Express Newspapers Ltd. v. Union of India*, AIR 1958 SC 578; *Sakal Papers Ltd. v. Union of India*, AIR 1962 SC 305; *Bennett Coleman Co. v. Union of India*, AIR 1973 SC 106]

- 2.8 Under article 19(2) as it stands today reasonable restrictions can be enacted “in the interest of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence”.
- 2.9 In its landmark judgment in the case of *Sakal Papers*, AIR 1962 SC 305, which has been consistently followed, the Supreme Court ruled that it is not open to the State to curtail the freedom of the press for promoting the general welfare of a section or a group of people unless its action can be justified by a law strictly falling under clause 2 of Article 19. Freedom of the Press cannot be curtailed on such omnibus grounds as in ‘national interest’ or ‘public good’ or any other concept not covered by the topics mentioned. Further the restriction must be reasonable. In other words, it must not be excessive or disproportionate. The procedure and the manner of imposition of the restriction also must be just, fair and reasonable.
- 2.10 The law of freedom of the press has been developed on a case to case basis by our Supreme Court in the area of privacy [*Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295; *Gobind v. Madhya Pradesh*, AIR 1975 SC 1378; (the defamation of public officials); *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264: (1994) 6 SCC 632; (Commercial Speech) *Tata Press Limited v. Mahanagar Telephone Nigam Limited*, AIR 1995 SC 2438: (1995) 5 SCC 139 and (Disclosure of information by candidates contesting elections). *PUCL v. Union of India*, (2003) 4 SCC 399]

CONFIDENTIALITY OF A JOURNALIST’S SOURCES – UNITED KINGDOM

3.1 *Attorney-General v. Mulholland*

In the United Kingdom the development of the law in regard to confidentiality of sources of a journalist has undergone rapid development. In the leading case of *Attorney General v. Mulholland*, (1963) 1 All ER 767, two journalists one Brendan Mulholland and Reginald Foster were sentenced to imprisonment because they refused to answer questions by a Tribunal of Inquiry and were held guilty as if for contempt of court. Articles written by these journalists reflected adversely and gravely on high placed civil servants and naval officers. The journalists refused to disclose the sources of their information when questioned. The Court of Appeal held that there were no privileges known to the common law which protected a journalist when he refused to answer. Lord Denning (M.R.) referred to three cases where the question was raised and answered against the journalists. He observed:

“It seems to me, therefore, that the authorities are all one way. There is no privilege known to the law by which a journalist can refuse to answer a question which is relevant to the inquiry, and is one which, in the opinion of the judge it is proper for him to be asked . . . I have

no doubt that the journalists ought to have answered the questions put to them. These were questions they were legally required to answer and they have no privilege to refuse.”(at pg 772 H)

Donovan L.J observed (pg. 772-773):

“While the journalist has no privilege entitling him as of right to refuse to disclose the source so, *I think, the interrogator has no absolute right to require such disclosure . . .* And, over and above these two requirements, there may be other considerations impossible to define in advance but arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude *that more harm than good would result from compelling a disclosure or punishing a refusal to answer*” (*emphasis supplied*)

In that case the Attorney-General concurred in the view of Donovan L.J. that the judge should always keep an ultimate discretion.

Thus though the privilege of a journalist did not exist in the Common law, the Court held that in appropriate cases the court has the final discretion not to compel disclosure of the source. It was a balancing process, whether compelled disclosure of the source would be more harmful to the public interest than not ordering such disclosure.

3.2 *British Steel Corp. v. Granada Television Ltd.*, (1981) 1 All ER 417 (HL)

In this case there was a national steel strike by employees of the British Steel Corporation. The Granada television received copies of secret documents of the Corporation and used them in their programme. The Corporation brought proceedings compelling Granada to disclose the identity of the informer which Granada television refused. The House of Lords affirming the Court of Appeal and the Chancery Division ordered disclosure negating Granada Television’s plea refusing disclosure on the ground that a strong public interest in doing justice outweighed any public interest in giving information to the public about the strike.

3.3 **Contempt of Court Act, 1981**

Meanwhile the Contempt of Court Act, 1981 was enacted by the British Parliament. Section 10 reads as under:

“No court may require a person to disclose nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime”.

This was a sea-change in the law and the codification of the ‘public interest immunity’ of journalists in contempt matters and an attempt to bring English law in line with Article 10 of the European Convention of Human Rights.

THE EUROPEAN CONVENTION

4.1 The European Convention for the Protection of Human Rights and Fundamental Freedom (1950) by Article 10 protects the right to freedom of expression

4.2 *Goodwin v. UK: European Court of Human Rights (ECHR)*

An interesting case arose in England when William Goodwin, a young trainee journalist on a British journal, 'The Engineer', received a telephone call leaking information about the financial affairs of a company. Although he was threatened with imprisonment, he consistently refused to reveal his source. He phoned the company to check facts in the article. They concluded the information came from a missing confidential corporate plan. They obtained an injunction to restrain the publication of the article. After granting the injunction, the trial judge held, and the Court of Appeal and House of Lords both affirmed (on an appeal by the publisher), that it was in the interests of justice for the company to find the leak (which was likened by one judge to a time bomb ticking away), likely to damage the company at some time in the future. They ordered the journalist to reveal his source. (1990) 2 All ER 1 (HL); *X Ltd. v. Morgan Grampian (Publishers) Ltd.*, (1990) 1 All ER 616 (CA). Goodwin then made an application against UK in the European Court of Human Rights under Article 10 of the European Convention on Human Rights. The European Court, (an eighteen judge bench) (1996 22 EHRR 123) stressed that freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press were of particular importance in the following words:

"The court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance.....*protection of journalistic sources is one of the basic conditions of press freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.* Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the convention unless it is justified by an overriding requirement in the public interest" (**Emphasis supplied**).

The Court found (11 to 7) that both the order to reveal his source, and the fine of £ 5000 imposed for refusing to do so, were a violation of Mr. Goodwin's right to freedom of expression.

Goodwin at last succeeded.

4.3 *Ashworth Hospital Authority V. MGN Ltd.*

A similar approach to confidentiality of source can be discerned in Lord Woolf's judgment in *Ashworth Hospital Authority v. MGN Ltd.*, (2002) 4 All

ER 193 (HL) following the Goodwin standard of the ECHR which is now part of English domestic law.. The House of Lords held that Section 10 of the 1981 Act required the court to stringently scrutinize any request for relief that would result in interfering with freedom of expression, including the ordering of disclosure of journalists' sources and the court had to be sure that a sufficiently strong positive case had been made out in favour of disclosure. Furthermore, the exercise of the disclosure jurisdiction had to meet a pressing social need and be proportionate to a legitimate aim that was being pursued. The situation had to be exceptional if disclosure of sources was to be justified. The court opined that the present case concerning the disclosure of a patients medical records fell under this exception since the identification of the wrongdoer was essential to prevent similar acts in the future. However, in *John v. Express Newspaper*, (2000) 3 All ER 257 the Court of Appeal protected the journalist's source when he published views from a Barrister's discarded draft opinion regarding conflict of interest of a solicitor.

UNITED STATES

- 5.1 "A reporter is no better than his source of information" observed Justice Douglas while dissenting in *Branzburg v. Hayes*, (33 L Ed 2d 626: 408 US 665) The majority speaking through White J. held that the First Amendment accords a reporter no privilege against appearing before a grand jury and answering questions as to either the identity of his news sources or information which he has received in confidence. This case still holds the field. Disclosure of sources and a confrontation between the media and the law has taken many interesting turns. Recently however, issues relating to the commission of crimes and investigation by grand juries before an indictment is laid have brought media in conflict with the law.
- 5.2 The case of the New York Times reporter Judith Miller received international coverage in July 2005. Miller, was jailed for contempt of court for refusing to testify before a federal grand jury investigating a leak by which a covert CIA agent's identity was disclosed. The agent was Valerie Plame, the wife of a former diplomat Joseph Wilson. Miller did not write about Plame, but was reportedly in possession of evidence relevant to the investigation. According to the subpoena, Miller had met with an unnamed government official – later revealed to be "Scooter" Libby, Vice President Cheney's Chief of Staff, two days after the former ambassador Joseph Wilson (husband of Valerie Plame) published an Op-Ed in the Times criticizing the Bush administration for "twisting" intelligence to justify war in Iraq. Miller was sentenced to four months imprisonment for refusal to disclose the source, however, after spending 85 days in jail, Miller was released after a telephone call with the source-Lewis Libby where he reaffirmed and released her of the confidentiality obligation.
- 5.3 In other cases also, journalists and media persons have had to face jail sentences for refusing to disclose their source. Many States in America

have enacted what are known as “shield laws” for protecting sources. There is an effort underway in the Congress to enact a “national shield law”. The idea behind protection is that the free flow of information on issues of public importance in a democratic polity are not choked or stifled. Such chilling effect would be subversive to dissemination of information which is essential for good governance and exposure of misconduct by public officials and others in high position.

INDIA

6.1 In India there has been no significant decision of the Supreme Court dealing in depth with the issue of confidentiality of journalist's sources in its modern context.

6.2 P.M. Bakshi in his book ‘Press Law’ on p. 98-99 notes two instances:

“Journalistic Privilege” Supreme Court Appeals No. 9 (1963) Vol. 1.: The editor of the *Hitabadi*, declined to say who was the writer of the poem published in his paper from which he had been charged with libel. The manuscript had been produced in court, but with the portion in which the name of the writer appeared, torn off. The editor preferred to go to jail, rather than disclose the name of the contributor. He was sent to jail for nine months.

Editorial, “Journalists and their sources” (31 March, 1980) Vol. 84, C.W.N. 85-87.: Bipin Chandra Pal refused to depose in court who was the author of an article for which Aurobindo Ghosh was subsequently acquitted, but Pal was sent to jail for six months for refusal to depose as to the above fact.”

6.3 Under the Evidence Act, a communication between a journalist and his source is not privileged. Privileged communications include communication between lawyer and client, husband and wife. On the other hand there is testimonial compulsion on a witness under Section 132, but the answer so compelled cannot be used against him in criminal proceedings. However, the Law Commission 93rd Report (1983) examines the issue of confidentiality of journalist's sources in detail and recommended insertion of Section 132A in the Evidence Act as under:—

“132A. No court shall require a person to disclose the source of information contained in a publication for which he is responsible, where such information has been obtained by him on the express agreement or implied understanding that the source will be kept confidential”.

Explanation.—In this section—

- (a) ‘publication’ means any speech, writing, broadcast or other communication in whichever form, which is addressed to the public at large or any section of public.
- (b) ‘source’ means the person from whom, or the means through which, the information was obtained”.

6.4 The Press Council

The Press Council Act, 1978 under Section 15(2) provides:

“While the Press Council can summon witnesses and compel them to give evidence, it cannot compel any newspaper, news agency, editor or journalist to disclose the source of any news or information published by that newspaper or received or reported by that news agency, editor or journalist.”

- 6.5 The Press Council has published, August 1996 Norms of Journalistic Conduct which provides that confidence should be respected:

Rule 46: If information is received from a *confidential source*, the confidence should be respected. The journalist cannot be compelled by the Press Council to disclose such sources; but it shall not be regarded as a breach of journalistic ethics if the source is voluntarily disclosed in proceedings before the Council by the journalist who considers it necessary to repel effectively a charge against him/her. This rule requiring a newspaper not to publish matters disclosed to it in confidence, is not applicable where:

- (a) consent of the source is subsequently obtained; or
 - (b) the editor clarified by way of an appropriate footnote that since the publication of certain matters were in the public interest, the information in question was published although it had been made ‘off the record’.
- 6.6 If a case reaches the Supreme Court it is most likely that the issue would be approached taking into consideration international human rights standards adopted by the ECHR and suitable guidelines may be evolved by the court based on the concept of ‘Public Interest Immunity’ and the core requirement of free dissemination of information to ensure a vibrant democracy and good governance.
- 6.7 Meanwhile we must rest content with the thought that

“..the Fundamental Rights enshrined in the constitution such as right to equality and freedoms have no fixed contents. From time to time, this Court has filled in the skeleton with soul and blood and made it vibrant *People’s Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399 (438) and

“it is established that fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience. The attempt of the Court should be to expand the reach and ambit of the fundamental rights by the process of judicial interpretation.” *People’s Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399 (453).

27

Contempt of Court and the Truth

This article was published in the Hindu on 29 October, 2007. It deals with the power of contempt, scandalising the court and the defence of justification by truth if it is in public interest under the amendment made to the Contempt of Courts Act, 1971 in March 2006. It mentions contempt proceedings commenced against former Chief Justice of India Justice Venkatramaiah, the standards in Europe and the pronouncement of the European Court of Human Rights. The Spycatcher case and the Delhi High Court judgment in the Mid-day case are also referred to.

In 2002, there were adverse comments widely reported in the print media in Karnataka regarding the private behaviour of some sitting judges of the High Court. The High Court suo motu commenced contempt proceedings against several publications for scandalising the Court and lowering its authority. The matter reached the Supreme Court and an agonised Chief Justice Khare while criticising the media for not disclosing their sources stated that “I will reward the media if they come out with the truth”... “I personally believe that truth should be a defence in a contempt case.”

Broadly, criminal contempt means either scandalising the Court or prejudicing a fair trial or interference with the administration of justice.

In the “Mid-day” case, a bench of the Delhi High Court without considering the defence of truth has imposed a severe sentence of four months imprisonment on the media for scandalising the Court. The case is now pending in the Supreme Court and raises far-reaching questions of public law.

The law as laid down by the Supreme Court following earlier cases was that justification or truth was no defence against summary proceedings for contempt when words were used which scandalised the Court or lowered its authority.

Parliament has now intervened and radically changed the law by Act 6 of 2006 by amending Section 13 of the Contempt of Courts Act, 1971 which states — “Notwithstanding anything contained in any law for the time being in force ... (b) the court may permit, in any proceedings for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bonafide.”

The Statement of Objects and Reasons to the Bill states that the amendment "would introduce fairness in procedure and meet the requirements of Art. 21 of the Constitution."

When the provisions of the Bill were discussed in the Lok Sabha, Law Minister H.R. Bharadwaj said "Suppose, there is a corrupt judge and he is doing corruption within your sight, are you not entitled to say that what you are saying is true? Truth should prevail. That is also in public interest."

The National Commission to Review the Working of the Constitution (NCRWC) headed by the distinguished former Chief Justice of India, M.N. Venkatachaliah, in its report stated "Judicial decisions have been interpreted to mean that the law as it now stands, even truth cannot be pleaded as a defence to a charge of contempt of court. This is not a satisfactory state of law. ... A total embargo on truth as justification may be termed as an unreasonable restriction. It would, indeed, be ironical if, in spite of the emblems hanging prominently in the court halls, manifesting the motto 'Satyameva Jayate' in the High Courts and 'Yatho dharmas tatho jaya' in the Supreme Court, the courts could rule out the defence of justification by truth. The Commission is of the view that the law in this area requires an appropriate change."

Chief Justice E.S. Venkataramiah, whose judgments on press freedom are liberal and well known — gave an interview to journalist Kuldip Nayar on the eve of his retirement. He stated "the judiciary in India has deteriorated in its standards because such judges are appointed as are willing to be 'influenced' by lavish parties and whisky bottles." ... "in every High Court, there are at least 4 to 5 judges who are practically out every evening, wining and dining either at a lawyer's house or a foreign embassy." The columnist further reported that "Chief Justice Venkataramiah reiterated that close relations of judges be debarred from practicing in the same High Court."

At the instance of a leading advocate, a petition was filed against Justice Venkataramiah bringing this interview to the notice of the Nagpur Bench of the Bombay High Court for instituting contempt proceedings against him for scandalising the entire judiciary. The Division Bench observed that the entire interview appeared to have been given with an idea to improve the judiciary and it was not a fit case where suo motu action was called for and dismissed the petition on merit.

International standards and laws of other democracies would be informative and enable us to arrive at the right standards. Professor Michael Addo of the University of Exeter has collected the views of many European experts in "Freedom of Expression and the Criticism of Judges."

In European democracies such as Germany, France, Belgium, Austria, Italy, there is no power to commit for contempt for scandalising the court. The judge has to file a criminal complaint or institute an action for libel. Summary sanctions can be imposed only for misbehaviour during court proceedings.

In Belgium, the media have been very critical of the functioning of the administration of justice and have strongly criticised individual judges. This tension between the press and the judiciary led to a seminal pronouncement of

the ECHR (European Court of Human Rights). Leo De Haes and Hugo Gijssels were editor and journalist of a weekly magazine *Humo*. They published five articles in which they criticised judges of the Antwerp Court of Appeal in virulent terms for having awarded custody of children to their father although there were serious allegations against him of incest and abuse of children. The three judges and the Advocate-General instituted proceedings against Haes and Gijssels seeking compensation for damage caused by the defamatory articles. The Tribunal of first instance held against the journalists and the same was affirmed by the Brussels Court of Appeal and on further appeal by the Court of Cassation. The journalists applied to the ECHR and succeeded. It was held that though courts had to enjoy public confidence and judges had to be protected against destructive attacks that were unfounded, the articles contained detailed information based on thorough research, and the press had a duty to impart information and ideas of public interest and the public had a right to receive them. It was held that there was a breach of Article 10 of the European Human Rights Convention which guaranteed freedom of speech and expression and there was also a breach of Article 6(1) (fairness of trial) because the Tribunal refused to study the reports of professors relied upon by the journalists. The journalists were awarded damages and costs of over Francs 964000 against the State. The case shows that there is no summary right of committal for contempt and the judges adopted proceedings for libel which ultimately failed.

Professor Addo concludes in relation to Article 10 of the European Convention of Human Rights that although all countries in Europe had an offence relating to the criticism of judges on their books only a few continue to punish for this offence and there is an emerging common European standard.

In the U.K., the offence of scandalising the court has become obsolete. The judiciary was vigorously criticised by the English press in the *Spycatcher* case. Peter Wright a former intelligence officer wrote his memoirs but the Court of Appeal enjoined the publication of the book in England. The House of Lords, by a majority of three against two confirmed the interim injunction and enlarged it. The *Times* of London came out with a blistering editorial which said: "Yesterday morning the law looked simply to be an ass. Those who regretted this fact were waiting with quiet confidence for the Law Lords to do something about it . . . But yesterday afternoon the law was still an ass ... In the hands [of] Lords Templeman, Ackner and Brandon (the majority who ruled for the gag order) it had become unpredictable and wild seemingly responsive only to autocratic whims."

The *Daily Mirror* came out with a front page caption "You Fools" and published the photographs of Lords Templeman, Ackner, and Brandon upside down.

In the United States, contempt power is used against the press and publication only if there is a clear imminent and present danger to the disposal of a pending case. Criticism however virulent or scandalous after final disposal of the proceedings will not be considered as contempt. The U.S. Supreme Court observed — "the assumption that respect for the judiciary can be won

by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste on all public institutions ... And an enforced silence, however, limited, solely in the name of preserving the dignity of the Bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect."

Our Parliament, by the recent amendment where justification or truth can be bona fide pleaded in the public interest has attempted clearly to bring our law in line with European and American standards.

Truth was treated as an 'untouchable' while exercising contempt jurisdiction for scandalising the Court. Parliament has now opened the doors of the temple of justice for the erstwhile untouchable.

In the case of Veeraswami, a former Chief Justice of Madras High Court, the Supreme Court observed: "A single dishonest judge not only dishonours himself and disgraces his office but jeopardises the integrity of the entire judicial system."

The contest is between truth and its suppression. The choice then is between the plea of truth to expose judicial misconduct and the attempt to stifle such publication by the use of the contempt power. The Delhi High Court through its "Mid-day" judgment has catapulted the issue nationally and internationally.

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Media as People's Voice – Pre and Post Independence

This article was published in the Souvenir of the Press Council of India on 16 November 2007. It deals with the early battle for freedom of expression (the case of John Wilkes in 1763), the controversy arising from P.B. Vachha's book on the history of the Bombay High Court and landmark decisions under the Indian Constitution.

PART I

VOICES FROM THE PAST

The Roman Senate

Freedom of speech and expression have been prized possessions of citizens to resist arbitrary power – whether exercised by a Monarch, the Executive, Parliament or even by the Judiciary. It was 44 B.C. when Rome was at the height of its glory and Julius Caesar was assassinated in the Senate – Marc Antony as part of the Triumvirate seized power. Cicero, probably the greatest and tallest advocate and statesman among the Romans wrote and published his famous Second Philippic – a scathing criticism of Antony. Antony responded by an act of gross savagery when his soldiers cut off Cicero's head and severed his hands and placed them on the 'Rostrum'. The celebrated historian Livy said of Cicero "no human voice was ever so admired for eloquence". Cicero paid with his life in exercising his freedom of expression.¹

John Wilkes: North Briton No. 45

In England, John Wilkes, on April 23, 1763 published and circulated – "The North Briton No. 45" criticizing the Minister's speech. The King and his advisers were offended. The Printer and Publisher were served under a "general warrant" without specific names and later Wilkes was also arrested. The Court of the Lord Chief Justice Sir Charles Pratt (Later Lord Camden) issued a writ of *Habeas Corpus* to produce Wilkes and he being a Member of Parliament was let off

1. Based on *All Jangle and Riot* by R.G. Hamilton pp. 15 and 16.

under his privileges. John Wilkes and the Printer sued the King's messengers for damages. The general warrants issued were declared illegal and substantial damages were awarded.²

Letters of 'Junius'

The freedom of the press was sought to be suppressed when the 'Public Advertiser' published the "Letters of Junius" highly satirical and critical of George-III's Ministers, advisors and favourites.

In 1769, the publishers were prosecuted for "Seditious libel" – the question was whether the Judge or the Jury should decide the question whether the words which were alleged to be seditious libel were so intended and amounted to 'Sedition'? Was the Jury to merely decide the question as to whether the publication was made by the defendant? In an earlier case Charles Pratt then a young counsel (Later Lord Camden) successfully argued that it was for the Jury to decide whether the words of the alleged libel were intended to be and amounted to seditious libel and not for the Judge. However, Lord Mansfield (Lord Chancellor) took the opposite view confining the Jury merely to decide the question whether the publication was actually made by the defendant accused and not whether it was seditious libel. Lord Mansfield was strongly criticized for his views and ultimately Fox's Libel Act, 1792 overruled that view because of the efforts of Lord Chatham and Lord Camden in the debates in the House of Lords.

Fox's Libel Act, 1792 declared—

"It is hereby declared and enacted that on every trial for the making or publishing of any libel, the jury may give a general verdict of Guilty or Not Guilty, upon the whole matter put in issue; and shall not be required or directed by the court or Judge, to find the defendant or defendants Guilty, merely on the proof of the publication of the paper charged to be a libel, and of the sense ascribed to the same in the Indictment or Information."³

A great triumph for the freedom of the press.

Bombay High Court Centenary

An inspiring assertion of the right to free expression is worth recalling. The centenary of the Bombay High Court was to be celebrated in 1962. Mr. P.B. Vachha (a Senior Lawyer) with a literary bent was requested by the Chief Justice of Bombay to write a history of the Bombay High Court. Vachha was critical of a tablet put outside the courtroom where Bal Gangadhar Tilak was convicted in his second trial, as being inappropriate in a court of law. After conviction Tilak uttered the famous words—

"All that I wish to say is that, inspite of the verdict of the Jury, I still maintain that I am innocent. There are higher powers that rule the destiny of men and nations; and I think it may be the will of Providence that the

2. Based on *Landmarks in the Law* by Lord Denning pp. 260 to 294.

3. Based on *Landmarks in the Law* by lord Denning pp. 284 to 294.

cause I represent may be benefited more by my suffering than by my pen and tongue.⁴

P.B. Vachha was critical of the Judge who convicted Tilak and admired and praised Tilak as a great patriot. But in a Postscript, he added the following words:

“The words of Tilak, uttered just before sentence was passed on him lingered, as they deserved, in the memory of later generations; and led to a strange sequel, about 50 years afterwards. They were inscribed on a marble tablet fixed outside the Court where he was tried. Honouring a patriot of the stature of Tilak with a statute or memorial tablet is right and proper. But Courts of law are not the right and proper places for political and patriotic memorials and demonstrations”⁵

Objections were raised about this Postscript and the matter could not be resolved and the High Court opined that it would not be proper to include the Postscript in a commemorative volume. Vachha writes—

“I was thus faced with the alternative of either withdrawing the Postscript from my History or withdrawing my History from the High Court and the latter course appeared to me to be the obvious path of duty.”⁶

The history was published not officially but privately, later on by a Committee led by the then Advocate-General H.M. Seervai and included among others, luminaries like K.M. Munshi, G.N. Joshi, N.A. Palkhivala and Atul Setalvad.

The great principle of freedom of expression was asserted by the Bombay Bar notwithstanding disapproval by the Judges.

Sedition

The Constituent Assembly Debates cast some light on the history of “seditious libel” or “sedition”. Article 19 (originally draft Article 13) enabled the State to legislate on “sedition” in derogation of the freedom of speech and expression. K.M. Munshi during the debates objected to the word “sedition” being retained in the Article. He said that he remembered a case in which criticism of a District Magistrate was regarded as ‘sedition’ under the Penal Code.⁷ Not only sedition was dropped but Article 19 was recast to broaden its sweep.

PART II

POST INDEPENDENCE : SOME LANDMARK DECISIONS UNDER THE CONSTITUTION

The contribution of our Supreme Court to the interpretation of Article 19(1)(a) and enlarging its ambit has been outstanding. The Court erected an impregnable foundation supporting freedom of speech and expression. It has protected

4. *Famous Judges, Lawyers and Cases of Bombay* by P.B. Vachha pp. 267.

5. *Famous Judges, Lawyers and Cases of Bombay* by P.B. Vachha p. 269.

6. *Famous Judges, Lawyers and Cases of Bombay* by P.B. Vachha in preface.

7. Constituent Assembly Debates (CAD) Vol. 7 PP. 731-733.

freedom of expression of the individual and the media against encroachments by the Legislature by the Executive and the political class.

The Security of the State, Public Safety and Public Order

In *Romesh Thappar v. State of Madras*⁸, the State of Madras prohibited the entry and circulation of the petitioner's publication "Crossroads". The order, and the law were challenged and struck down - even though it was sought to be justified on the ground of 'public safety' and 'public order'. It was observed at page 602:

"We are therefore of opinion that unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of Article 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order.

....We are unable to accede to this contention. Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable."

Restrictions only under Article 19(2)

In *Sakal Papers (Pvt.) Ltd. v. Union of India*⁹, the Court reiterated that the freedom of speech and expression could only be curtailed and restricted by imposing reasonable restrictions as mentioned in Article 19(2) *i.e.*, in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality or contempt of court, defamation or incitement to an offence. It could not be curtailed in the interest of the general public or for securing another freedom. It was observed at page 863:

"It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgement on the same grounds as are set out in clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. It cannot, like the freedom to carry on business, be curtailed in the interest of the general public..."

8. *Romesh Thappar v. State of Madras*, 1950 SCR 594: AIR 1950 SC 124.

9. *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842 (866): AIR 1962 SC 305.

Price Page Schedule: Newsprint Control

In *Bennett Coleman v. Union of India*¹⁰, an order restricting circulation by a price page schedule was challenged.

The newsprint policy was challenged which fixed a maximum number of pages which a newspaper would be allowed to print and newsprint was supplied accordingly. The ostensible reason was that small newspapers would benefit and a combination of large newspapers would be discouraged. The Control Order was invalidated. It was held:

"In the present case it cannot be said that the newsprint policy is a reasonable restriction within the ambit of Article 19(2). The newsprint policy abridges the fundamental rights of the petitioner in regard to freedom of speech and expression. The newspapers are not allowed their right of circulation."¹¹ ... "The true test is whether the effect of the impugned action is to take away or abridge fundamental rights."..... "The word 'direct' would go to the quality or character of the effect and not to the subject-matter. The object of the Law or executive action is irrelevant when it establishes the petitioner's contention about fundamental right."¹²... "The direct effect is the restriction upon circulation of newspapers.".... "The direct effect is that they are exposed to financial loss. The direct effect is that freedom of speech and expression is infringed."¹³

Taxation, Customs Duty and Circulation

In *Indian Express Newspapers v. Union of India*¹⁴ – heavy customs duty was levied on newsprint which was invalidated as being subversive and destructive of press freedom.

After an exhaustive review of the authorities, it was held:

"The Constitutional guarantee of the freedom of speech is not so much for the benefit of the press as it is for the benefit of the public"..... "Newspaper is the most potent means for educating the people "¹⁵.. "The test for determining the vires of a statute taxing newsprint have therefore, to be different from the test usually adopted for testing the vires of other taxing statutes. In the case of ordinary taxing statutes, the laws may be questioned only if they are either openly confiscatory or a colourable device to confiscate. On the other hand, in the case of a tax on newsprint, it may be sufficient to show a distinct and noticeable burdensomeness clearly and directly attributable to the tax...."¹⁶

10. *Bennett Coleman and Co. Ltd. v. Union of India*, AIR 1973 SC 106: (1972) 2 SCC 788.

11. *Bennett Coleman and Co. Ltd. v. Union of India*, AIR 1973 SC 106 (130).

12. *Bennett Coleman and Co. Ltd. v. Union of India*, (1972) 2 SCC 788: AIR 1973 SC 106 (119-120).

13. *Bennett Coleman and Co. Ltd. v. Union of India*, AIR 1973 SC 106 (119-120): (1972) 2 SCC 788.

14. *Indian Express Newspapers (Bombay) Private Ltd. v. Union of India*, (1985) 1 SCC 641: (1985) 2 SCR 287.

15. *Indian Express Newspapers (Bombay) Private Ltd. v. Union of India*, (1985) 1 SCC 641: AIR 1986 SC 515 (528)

16. *Indian Express Newspapers (Bombay) Private Ltd. v. Union of India*, (1985) 1 SCC 641: AIR 1986 SC 515 (540) para 67.

“Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed, without circulation the publication would be of little value”¹⁷

Consequently, the levy was stayed and government directed to reconsider it in accordance with the directions given.

Privileges of the Legislature

The leading case of *Keshav Singh*¹⁸ protected the press and journalists from arbitrary exercise of the power of punishing for contempt for a breach of legislative privilege. The facts are interesting. A Journalist wrote disparagingly about the UP legislators. He was summoned at the Bar for contempt of the House. He approached the Court on a *Habeas Corpus* Petition praying for an interim stay of the order. Two Judges of the High Court granted interim stay. The legislature was offended. It directed that the two judges and Keshav Singh's advocate “should be brought in custody before the House”. On hearing the news on radio, the concerned judges (as petitioners) applied to the High Court for quashing and for an interim stay of the order. 28 Judges of the High Court sat in a Division Bench, in a show of strength and granted stay. Jawaharlal Nehru the then Prime Minister, persuaded the President to make a Reference to the Supreme Court to give its advisory opinion. The Court laid down that the legislative privileges had to be reconciled with the fundamental right under Article 19(1) (a) and Article 21; that Judges have the right to adjudicate the matter and were not subject to the contempt jurisdiction of the legislature while exercising their constitutional powers; the Journalist, his lawyer and the judges were not liable to be held for contempt in the manner attempted by the legislature.

This was a landmark decision in favour of the freedom of the press.

Electoral Candidates

Finally, one cannot do better than recall the great blow in favour of the public and against the political class in the celebrated case of *PUCI v. Union of India*¹⁹. While striking down a statute attempting to curtail disclosures by electoral candidates the Court emphatically stated that electoral candidates must disclose information about their antecedents and assets in the public interest while filing their candidatures. The approach of the Supreme Court was to enrich and expand the ambit of Article 19(1)(a) by a process of judicial interpretation.

In most areas the Indian Supreme Court's record in broadening this freedom is praiseworthy and enlightened and in line with international human rights standards. The Court has acted as a bulwark against encroachments by the Legislature and the Executive.

17. *Indian Express Newspapers (Bombay) Private Ltd. v. Union of India*, (1985) 1 SCC 641: AIR 1986 SC 515 (551) para 98.

18. *In re, under Article 143, Constitution of India Special Reference No. 1 of 1964*, AIR 1965 SC 745: (1965) 1 SCR 413.

19. *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399.

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Criminal Defamation – The Case of the Cross-country Ordeals

This article was published in the Outlook, in the 10th August, 2015 issue. When this article was written, the constitutional validity of Sections 499 and 500 of the Indian Penal Code were challenged before the Supreme Court. Later, the Supreme Court upheld the constitutional validity of Sections 499 and 500 of the Indian Penal Code by its judgment dated 13th May, 2016.

Libel, referring to written words, and slander, referring to spoken words, together constitute defamation when published, and which injure or tend to injure the reputation of the victim and expose him or her to hatred, ridicule or contempt. These are the core ingredients of defamation. In India, defamation can give rise to a civil action in tort for damages or prosecution for a crime. This article is concerned only with criminal defamation. Its theme is that the provisions dealing with criminal defamation (Sections 499-502, Indian Penal Code, 1860) have outlived their utility. Besides, there has been widespread abuse of these provisions. Powerful politicians and rich individuals have used them to harass and intimidate individuals and the media.

Under the common law of England, defamation was not a criminal offence unless it had a tendency to cause a breach of peace. However, Thomas Babington Macaulay, the father of the Indian Penal Code (IPC), made it a criminal offence in India even if there was no tendency to cause breach of peace—a significant departure from the English common law. This he did to protect the colonial government and its officials. Currently, in the United Kingdom, a law that came into force in 2010 has abolished the offences of defamatory libel and obscene libel in England, Wales and Northern Ireland.

In the well-known Khushboo case of 2010, the south Indian actress, who had advocated societal acceptance of pre-marital sex and live-in relationships in a magazine, was cited by a Tamil daily which allegedly reproduced her statement (the accuracy of which she denied) thus: “About which culture are the persons who are protesting against my interview talking about? Is there anyone who does not know about sex in Tamil Nadu? Is there anyone who does not know about AIDS? How many men and women do not have sex before marriage?”

Twenty-three criminal complaints were filed against Khushboo in courts across the state. Complaints were also filed under the Indecent Representation of Women (Prohibition) Act, 1986.

Khushboo approached the Madras High Court for quashing all criminal proceedings instituted against her under Section 482 of the Criminal Procedure Code (CrPC). The HC refused to quash the proceedings and Khushboo appealed to the Supreme Court. The Supreme Court held that there was no obscenity in Khushboo's remarks. It also held that there was no *prima facie* case of defamation. There was no intent on the part of Khushboo to cause harm to the reputation of the complainants. Nowhere was it suggested that all women in Tamil Nadu are engaged in pre-marital sex.

The Supreme Court observed: "We are of the view that the institution of numerous criminal complaints against the appellant was done in a *malafide* manner." In order to prevent the abuse of the criminal law machinery, the court granted relief to Khushboo by quashing all the complaints. It also observed that: "Initiation of criminal trial is a process.... It should not be triggered by false and frivolous complaints, amounting to harassment and humiliation to the accused." The idea is that intolerant groups should not be permitted to harass honest expression of views.

The *Spycatcher* case, or Attorney-General versus Guardian Newspaper, 1987, a sensational case of England, is also worth recalling. Peter Wright, a member of the British secret service MI5, authored a book of memoirs called *Spycatcher*. He disclosed various secrets. The British government moved the English courts to stop publication of the book and of reports of court proceedings in a case in Australia, where the British government had moved to injunct the publication of the book. Meanwhile, the book was freely available in US and outside England and was in the public domain. The court of appeal granted an injunction. The House of Lords, which used to have a role as a court of last resort, not only upheld the gag order by a majority of three against two but also enlarged it. The British press was furious. There was a stinging attack on the judges of the House of Lords. The Times editorial was blistering: "Yesterday morning the law looked simply to be an ass. Those who regretted this fact were waiting with quiet confidence for the Law Lords to do something about it. We hoped that they would accept the reality that the secrets of Mr. Peter Wright's book *Spycatcher* were irretrievably in the public domain...but yesterday afternoon the law was still an ass. But as a result of their Lordships' judgement it was no longer a dozy docile domestic creature whom a kick in the right place would restore to useful activity. In the hands of Lord Templeman, Ackner and Brandon (the majority who ruled for the gag order) it had become unpredictable and wild, seemingly responsive only to autocratic whims."

The Daily Mirror came out with a front page caption 'YOU FOOLS' and published the photograph of Lord Templeman, Ackner and Brandon upside down. This front page has now been immortalised as a cover in a book by Simon Lee called *Judging Judges*. This robust criticism did not trigger any defamation or even contempt proceedings.

To come to another point, an enormous number of financial scams are being exposed by whistle-blowers and the media. They are vulnerable to harassment by the filing of criminal complaints across the length and breadth of the country. It is financially and physically impossible to defend such a spread of complaints, filed in a number of courts in towns and cities across the country. They are only meant to harass, intimidate and coerce by abusing the machinery of the criminal law of defamation.

Currently, Dr. Subramanian Swamy's writ petition, under Article 32 of the Constitution, with a prayer to declare Section 499 and 500 of IPC and Section 199 (2) of the CrPC as unconstitutional, is being heard by the Supreme Court. Swamy had in the past vigorously criticised Jayalalitha, for which 100 criminal cases were filed against him all over Tamil Nadu by local public prosecutors. These were later withdrawn. Swamy also alleges that in 2014, a series of criminal defamation proceedings were filed against him in Tamil Nadu by Jayalalitha.

With the passage of time, and with many countries decriminalising defamation, India should move to adopt international norms and standards. The rich and the powerful are using criminal defamation in India to harass and intimidate individuals and silence the media. It is a well-settled law that the passage of time and changed circumstances, including societal developments, can render laws which were reasonable and valid when passed becoming unreasonable and invalid. This principle needs to be applied to invalidate Section 499 and 500 of the IPC, along with Section 199 (2) of the CrPC. Under Article 13(1), the above provisions of the IPC and CrPC were laws in force before the commencement of the Constitution and can be declared null and void if they are inconsistent with fundamental rights. Article 19 guarantees freedom of speech and expression subject to reasonable restrictions under Article 19(2) related to defamation. Under changed conditions and widespread abuse, isn't making defamation a crime an unreasonable restriction?

If such a drastic solution is unacceptable, it is desirable that the accused should have the choice where the complaint should be investigated and pursued—preferably where he resides or carries on his occupation. This would avoid his being dragged to defend complaints all over India. The forum for the complaint should not be where the alleged offence is committed by publication of the defamatory material but should be at the choice of the accused entertained and pursued at the place of his residence or work. Secondly, the State should appoint public defenders at its cost to defend the accused when multiple complaints are filed all across India. Most of these cases fail, but the harassment is an undeserved punishment which few individuals can afford. Stringent and substantial provisions on payment of costs should be imposed on unsuccessful complaints. In sum, why not follow the British law and abolish criminal defamation?

*Judicial Review –
Public Interest
Litigation –
Political Corruption*

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Judicial Review and Political Corruption – An Indian Case Study

This presentation was made at the XVth LAWASIA Conference at Manila, Philippines held from 26-31 August 1997. It principally deals with the case of Vineet Narain v. the Union of India (the Jain Hawala Case) where final judgment was not delivered till 18 December 1997; the events narrated were as on 15 May 1997 when the paper was prepared. It mentions the resignation of three Cabinet Ministers, the Leader of the Opposition and two Governors and the election results of April-May 1996 where the Congress Party seats in the Lok Sabha were reduced to half and Prime Minister P.V. Narsimha Rao was voted out of office.

How Constitutional Courts are Attempting to Fight Political Corruption in India Through Judicial Review

I

INTRODUCTION

1.1 Cabinet Ministers Charged—On 16th January, 1996, in the case of *Vineet Narain v. Union of India*, (1996) 2 SCC 199: AIR 1996 SC 3386, before the Supreme Court of India, (The *Jain Diaries* Case also known as the *Jain Hawala* Case) the Central Bureau of Investigation (CBI) announced that sanction had been sought from the Competent Authority under the Prevention of Corruption Act for prosecution of three Cabinet Ministers in the Central Cabinet namely

V.C. Shukla, Balram Jakhar and Madhav Rao Scindia. In addition the Court was informed that five former Cabinet Ministers and the Leader of the Opposition were also being charge-sheeted in a corruption case.

The events narrated are as on May 15, 1997 when the paper was prepared.

The leader of the Opposition L.K. Advani promptly resigned thereby creating public opinion which forced the resignation of the Cabinet Ministers who were otherwise very reluctant to give up office.

1.2 The news shook the nation—It sent shock waves through the ruling Congress party. Subsequently at least 20 other prominent politicians and several top bureaucrats, some of whom had occupied high positions in the government and government enterprises, were also charged in corruption cases.

1.3 Two Governors charged—In May 1996, two sitting Governors one of Kerala (Shiv Shankar) and the other of Uttar Pradesh (Moti Lal Vora) who enjoyed constitutional immunity from prosecution during their tenure of office were forced to resign because of the court proceedings in the case and have now been charged.

1.4 Elections—Ruling Party and Prime Minister Voted Out—The general elections were held in April - May 1996. The Jain Hawala Scandal took its toll. The fall-out of the case adversely affected the ruling Congress Party which was reduced to 130 odd seats in a House of about 544 and its strength was reduced by half in the new House of the People (Lok Sabha). Prime Minister P.V. Narasimha Rao was voted out of office.

(2) As on May 15, 1997, the High Court of Delhi has quashed the charges for insufficiency of evidence but the matter may be carried in Appeal.

1.5 Investigative Agencies—The case is a seminal one in many ways and mine is an insider's view having argued the matter for the Petitioners.

For the first time after independence, as a result of judicial review of administrative action politician in power have been investigated and interrogated and have faced trial. Upto then no politicians or former Ministers of government had been asked or even questioned in spite of widespread rumours of financial scandals, questions in Parliament and newspaper reports. The police were under the political executive and did not and could not perform their duties in spite of stringent laws. The main investigative agencies are the normal Police forces in each State, the Central Bureau of Investigation (CBI), (an elite police force formed under a special statute and under the Central Government), Income-tax and Revenue Authorities.

1.6 All these provisions were only on paper and never touched Ministers and politicians. Kick-backs and commissions were widely rumoured but never investigated or precisely pinpointed.

1.7 Some Accused Discharged—At the time of writing this paper (May 1997) some of these politicians have been discharged by the High Court of Delhi because of insufficiency of evidence but an appeal is contemplated by the authorities.

1.8 This was not unexpected by many and the public perception was that the investigating authorities were not vigorously carrying out their duties.

II

BACKGROUND

2.1 Democratic Elections — Funding—Controlled Economy—Indian democracy, now 50 years old, works on adult franchise and five yearly general elections. Democratic elections require enormous funding. Until 1991, when the Indian economy was deregulated and opened up for foreign investments, the model followed was a mixed economy with a dominant Government sector. This reposed enormous powers of patronage concentrated in the hands of Ministers and bureaucrats. Permissions, licenses, approvals were the order of the day. Politics was a full-time career and instead of being a public service became a private enterprise.

2.2 Federal Constitution — Judicial Review—India has a federal constitution. The Supreme Court of India (the highest federal court) and High Courts in each state enjoyed powers of judicial review both over legislative enactments and administrative action. These Courts could invalidate legislation both federal and State on grounds of violation of fundamental rights, want of legislative competence or being otherwise unconstitutional.

2.3 Enlargement of Judicial Review—For the last 50 years this power of judicial review due to a variety of circumstances has been explosively enlarged by a series of decisions of the Supreme Court. To understand the quantum jump taken in the case under study the subject-matter of this paper - a few broad principles developed through a series of cases - are worth noting.

2.4 Article 14: Article 21—First, the interpretation of Article 14 (the Equality Clause) and Article 21 (Protection of Life and Liberty) and their gradual expansion played a pivotal role in enlarging the ambit of judicial review. In the 1950s, the equality clause was limited only to discriminatory treatment.

2.5 Justice Vivian Bose captured the essence and soul of Article 14 in the following words:

“Article 14 sets out an attitude of mind, a way of life rather than a precise rule of law”.

And again:

“That the Constitution is not for the exclusive benefit of Governments and States It also exists for the common man for the poor and the humble for the ‘butcher, the baker and the candlestick maker’.

[*The Bidi Supply Co. v. Union of India*, AIR 1956 SC 479 (485)].

2.6 Equality Protection Against Arbitrary Action—Over a period of time the equality clause was widely interpreted so as to include not only discriminatory treatment, but also any arbitrary action or inaction. It was held that arbitrariness was the enemy of equality and, therefore, anathema to republicanism which meant equal treatment. This enlarged the scope of judicial review which could

now target any arbitrary action or inaction. See *Ajay Hasia v. Khalid Mujib Sehravardi*, AIR 1981 SC 487.

2.7 Fundamental Rights Case—Inherent Limitation—Rule of Law and Judicial Review – Basic Features—Second, in the Fundamental Rights case (*Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461) a 13 Judge Bench by a majority of 7 against 6 invalidated a constitutional amendment. This was unprecedented in any part of the world because the amendment had been passed by the requisite majorities and had no defect in “manner and form”. It was invalidated on the ground that there were inherent or implied limitations of the power to amend the Constitution and the power to amend did not include the power to change or alter the basic structure of the Constitution. The basic structure of the Constitution would cover among other concepts, the Rule of Law, the principle of equality, secularism, democratic election and judicial review.

2.8 Locus Standi Relaxed—Third, in a series of cases, the traditional principles of *locus standi* or standing were jettisoned in Public Interest Litigations (PIL) while enforcing group or collective rights of people like women, children, prisoners, bonded labour and other disadvantaged groups. Any person, a journalist, a social activist, a public spirited lawyer or any other citizen could move the Court in the public interest. The Court sometimes acted even on a letter or *suo motu*. The only limitation being that the petitioner was not acting *mala fide* or for private interests or for partisan political purposes. The standing and locus requirements as known in the traditional sense were completely overturned.

2.9 Life and Liberty – Wide Construction—Fourth, article 21 which runs as under:

“Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law”

was over a period of time very widely construed, overturning earlier judgments. It was interpreted to embrace not only the right to live but the quality of life. Thus petitions complaining against adverse effects on the environment by industrial pollution, vehicular pollution affecting the quality of life of the community were entertained.

2.10 Rights of undertrials or prisoners languishing in jails, bonded labour, quarry workers and disadvantaged groups’ rights were also subjected to judicial review by the extended ambit of Article 21 and the relaxation of *Locus Standi* requirements.

2.11 Springboard and Foundation.—It was in this background and from this springboard and foundation laid in the last 50 years that the case which I am discussing was considered.

III

THE FACTUAL BACKGROUND

3.1 How was the process of investigation and launching of prosecution commenced through Court Proceedings and judicial review? It is a story worth telling.

3.2 Terrorist Funding—In March 1991, one Ashfak Hussain Lone, Deputy Chief of “Hizbul Mujahideen”, a terrorist organization operating in Kashmir, was arrested in Delhi. On interrogation, information was received that the terrorist activities in India were being financed from abroad. Foreign exchange cannot freely come into India directly except through authorised banks. Undeclared moneys stashed in foreign currency or foreign funds for financing alleged terrorist activities come through illegal channels.

3.3 “Hawala” means a compensatory payment i.e. moneys are paid abroad in foreign currency to a middleman and he arranges an equivalent payment in India in Indian Rupees through unauthorized channels or the reverse *viz.*, Indian rupees paid in India are compensated in foreign currency both completely illegal transactions.

3.4 Foreign exchange is tightly controlled in India and it is generally an offence to keep funds in foreign currency abroad or to transfer rupee funds into foreign currency except under strict regulation through authorized bankers. Foreign exchange earned has to be remitted through authorized banks. Stringent provisions under the Foreign Exchange Regulation Act (FERA) have armed Enforcement Department with wide powers of investigation/interrogation imposing penalties and commencing prosecution.

3.5 Searches – May, 1991—Jain Diaries Seized—CBI Cover up.—Simultaneous raids and searches took place on 3rd May, 1991 at many places including the offices and residences of the Jains (S.K. Jain, B.R. Jain and N.K. Jain (3 brothers) - a sequel and trail emanating from the interrogation of terrorists and the “Hawala” channels. The agencies wanted to ascertain the source of terrorist funding from outside India. In those raids unaccounted Indian Currency of 5.8 million rupees and foreign currency worth 20,000 US \$ were seized from the Jains. Also seized were two diaries and two note books containing accounts maintained by J.K. Jain, cousin and employee of the Jain brothers. He had maintained these accounts which showed receipt of monies from abroad and disbursements from April 1988 - March 1991. Meticulous accounts kept in coded initials in the diaries showed that from April 1988 to March, 1991, disbursements to the extent of about Rs. 600 million were made to top politicians, bureaucrats and others from moneys received from abroad through the illegal “Hawala” or compensatory payment route. The Central Bureau of Investigation (CBI) started investigations but due to the names of top politicians and bureaucrats in the Jain diaries the matter was hushed up and no proper interrogation or even arrest of the Jains took place for over two years. The Jains were meanwhile keeping a high life-style in Delhi and hosting and mingling with top politicians. There were periodic rumours and Press Reports about the raids and the matter slipped away from public gaze during the election campaign in April - May 1991. After the assassination of Rajiv Gandhi in mid May 1991 a new government was elected in May 1991 and Shri P.V. Narasimha Rao became Prime Minister.

3.6 Mid 1993 – Video Journalist—In 1993, photocopies of the Jain Diaries surfaced and fell into the hands of Vineet Narain, an intrepid Video Journalist. He tried to interview and question the CBI head who refused to comment. He

also tried to interview the concerned politicians most of whom avoided his queries but a few admitted receipts from Jains but said they were for election purposes. This established the authenticity of the diary entries in the public mind. All this was recorded by Vineet Narain on his video film. The censoring authorities banned the film but the review committee (headed by a former judge Justice Lentin) in appeal set aside the order. A Public Interest Litigation (PIL) was then instituted in the Supreme Court of India in the latter half of 1993 by Vineet Narain, Rajinder Puri (journalist), Kamini Jaiswal and Prashant Bhushan, the latter two being experienced and fearless lawyers of good standing.

IV

Legal Framework

4.1 PIL Petition—After the (PIL) petition was filed I was approached to ascertain whether I would appear for the Petitioners in a “*pro bono publico*” capacity as many politicians in power were involved. I readily accepted the assignment as a public duty.

4.2 Cause of Action—How was the petition structured? What is the cause of action? How can the Court interfere? Was the matter capable of judicial review? These were some of the interesting questions which had to be faced.

4.3 The Equality Clause – Wide Construction—The Cause of Action was the grievance of the Petitioners as citizens of India arising out of non-enforcement of the penal law and a cover-up by the Investigative Agencies. The Petitioners in the public interest sought a *mandamus* requiring the CBI and other agencies to perform their statutory duties to investigate crimes and the Petitioners as citizens invoked Article 14 (the Equality Clause) of the Constitution which is a fundamental right. The only Respondents in the Petition were the Government and the CBI. The Indian Courts (unlike other jurisdictions) have very widely interpreted the equality clause to embrace not only discriminatory or unequal treatment but also any Governmental action or inaction which is arbitrary. Arbitrariness says the Court is the very antithesis and enemy of equality whether it results in discrimination or not.

4.4 It was averred that non-enforcement of law is an act of arbitrariness violating the rights of Indian citizens and uncontrolled corruption in high places subverts the Rule of Law and is a threat to democracy itself.

4.5 Prayers in Petition—It was also averred that the CBI as a Premier Investigating Agency has failed to enforce the law for over two and a half years. The petitioners in the Public Interest, therefore, prayed to the Supreme Court under articles 32 and 142 to creatively craft a procedure and a machinery and give appropriate orders so that a proper investigation takes place and charges are filed and a fair trial is thereafter ensured to the accused. It was prayed that the investigating agencies had covered up the matter because they were subordinate to the political executive and, therefore, the Court must ensure through an appropriate Writ that they do their duty impartially and objectively and report to the Court. For that purpose, if necessary, Special Commissioners, Committees, Experts be designated by the Court to report back to the Court.

4.6 Crucial Order December 1993—The Court was initially very hesitant because the Jain Diaries were a time-bomb which might create a confrontation between the judicial power and the political leadership. Several hearings took place before an order was made in December 1993 directing the CBI to file a return indicating whether the facts alleged were true and what investigations have been initiated. The order also directed sealing of the Jain diaries and notebooks seized from the Jains.

4.7 This order was a significant turning point—The Courts had never upto then questioned the CBI an elite Central Police Force. In fact on many occasions CBI had been called in to investigate matters when the State Police had failed to do a good job under local political compulsions. In the return to the Petition most of the allegations about the raids and seizures of the diaries were admitted but the CBI continued the cover-up. In the return the CBI stated that the petition was not *bona fide* and was actuated by personal motives. As the case progressed, it was clear that it was the CBI which had not acted *bona fide* and had done a tremendous cover-up operation.

4.8 Long Hearing—Two Bureaucrats Summoned—Continuing Mandamus—Hearings took place in end November and early December 1994. The Bench was upset and concerned at the inaction of the authorities and summoned the head of the CBI (called Director, Central Bureau of Investigation) to remain present in person and the entire investigations into the matters were directed to be personally supervised by him as overall incharge from December 05, 1994. He was made directly responsible to the Court and was directed to complete the investigations expeditiously. The Court later directed the Revenue Secretary, the Director of Enforcement (FERA) and the Director of Investigation (Income Tax) to remain present in person at every hearing. Such orders summoning these top bureaucrats were unprecedented and gave a clear message that the Court meant business. The Court fashioned a new procedure - Public hearings and on the application of the Solicitor-General “in camera” hearings where reports were made by the investigative agencies regarding sensitive confidential material in the ongoing police investigations. The case is not closed but adjourned from time-to-time - as felicitously put a “Continuing Mandamus”.

The Court's Powers

4.9 Blackburn's Case—The landmark judgment of Lord Denning *R. v. Metropolitan Police Commissioner: Ex-parte Blackburn*, (1968) 1 All ER 763, is path breaking. That case involved non-enforcement of gaming laws by a policy decision of the English police. Lord Denning's dicta are worth quoting. He said:

“I have no hesitation, however, in holding that, like every constable in the land he should be, and is, independent of the executive.....”

“I hold it to be the duty of the Commissioner of Police, as it is of every Chief Constable to enforce the law of the land. He must take steps so to post his men that crimes may be detected and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and if need be bring the prosecution or see that it is brought; *but in all these things he is not the servant of anyone save of the law itself. No Minister of the Crown can tell him that he must or*

must not keep observation on this place or not: or that he must or must not prosecute this man or that one; Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."

(emphasis supplied).

4.10 Krishna Iyer's Dicta.—A great judge of the Indian Supreme Court (Justice Krishna Iyer) had said in a judgment: (1979) 1 SCC 380 (446).

"Fearless investigation is a *sine qua non* of exposure of delinquent 'greats' and if the investigative agencies tremble to probe or make public the felonies of high office, white collar offenders in the peaks may be unruffled by the law. An independent investigative agency to be set in motion by any responsible citizen is a desideratum".

COURT PROCEEDINGS: TWO SEMINAL ORDERS

5.1 January 1996, Three Cabinet Ministers Implicated – Presumption of Corruption—On 16 January, 1996 after several hearings through 1995 the CBI reported to the Court that they had applied for sanction for prosecution on corruption charges against 3 sitting Cabinet Ministers. They also charge-sheeted several others including the Leader of the Opposition. In India there is a statute called the Prevention of Corruption Act in which any money received by a public servant which is not legal remuneration to which he is entitled is presumed to be illegal gratification. However the presumption can be rebutted by the public servant.

5.2 Political Turmoil—The news hit the headlines on 17 January 1996. The whole political fabric was shaken. The Leader of the Opposition resigned from his seat in Parliament. The reluctant Ministers in the Ruling Party also resigned in view of mounting adverse public opinion.

5.3 January 1996 Order—By an order dated 30 January 1996 the court explained what the petition was about and its scope. The Court explained that the gist of the allegations was that the CBI and other Governmental agencies failed to perform their duties in as much as they failed to properly investigate matters arising out of the seizure of the "Jain Diaries". The Court expressed its concern that the apprehending of certain terrorists led to the discovery of financial support to them by clandestine and illegal means, by use of tainted funds obtained through 'Hawala' transactions. The Petition also disclosed a nexus between several important politicians, bureaucrats and criminals, who are all recipients of money from unlawful sources given for unlawful considerations and the CBI and other Governmental agencies failed to fully investigate into the matter. The Court noticed the allegation that there is some connection between important politicians and criminals and that the matter discloses a definite nexus between crime and corruption in public life at high places which pose a serious threat to the integrity and security and economy of the nation, the Rule of Law and the preservation of democracy itself. The Court therefore required that Governmental agencies would be compelled to perform their duties and proceed in accordance with the law against each and every person involved, *irrespective of the height at which he is placed in the power set up.*

5.4 The Rule of Law—The Court said the concept of equality enshrined in the Constitution and the basic tenet of the rule of law was : “Be you ever so high, the law is above you”. The Court stated that its intervention was imperative to retain public confidence in the impartial working of the government agencies. The Court made it clear that once a charge is filed in a competent criminal court then that Court will deal with the case on merits in accordance with the law. The Court observed that the results achieved so far by the investigating agencies did not match the available time and opportunity since the matter came to light. It observed that it is of the utmost national significance that no further time is lost in completion of the task.

5.5 More Charges—In February 1996, another 14 powerful politicians were charge-sheeted. The CBI was directly under the Ministry of Personnel which is always headed by the Prime Minister of India who then was Shri P.V. Narasimha Rao. One of the statements recorded by the CBI implicated the Prime Minister. In the normal course the CBI Chief would have to report to the political executive *viz.*, the Prime Minister and the public perception was that he continued to do so.

5.6 February 1996 Application—An application was moved by the petitioners the basis of certain news reports that Prime Minister Rao was directly personally monitoring the activities of the CBI and selectively targeting charge-sheets being filed against opposition members as well as his potential rivals in his own party whose names appeared in the Jain Diary. One of the Jains-namely S.K. Jain-during his interrogation on 11 March 1995 had also implicated the former Prime Minister Rao. On the strength of that report an application was made to the Court in February 1996. It was stated in the application that the Prime Minister’s position placed him where his duty conflicted with his interest. All authorities subordinate to him were also in that position and therefore the CBI could not function properly. The CBI deserved to be unshackled from its political masters, otherwise the rule of law would be imperilled. It was, therefore, prayed that the CBI and its Director should be directed not to report to any person against whom serious allegations were made. It was submitted that all public power is a trust and how could trustees of public power investigate themselves. It was prayed that to preserve the rule of law the Court may direct that the CBI may be relieved from reporting to bureaucrats or the political executives.

5.7 Historic Order of 1 March 1996—A historic order was then passed on 1 March 1996 unprecedented and unparalleled in Indian judicial history. The order said *inter alia*: “To eliminate any impression of bias and avoid erosion of credibility of the investigations being made by the CBI and any reasonable impression of lack of fairness and objectivity therein, it is directed that the CBI would not take any instructions from, report to or furnish any particulars thereof to any authority personally interested in or likely to be affected by the outcome of the investigations into any accusation. This direction applies even in relation to any authority which exercises administrative control over the CBI by virtue of the office he holds without any exception”.

5.8 The CBI said that they were not reporting to any authorities but that was difficult to believe. May be formally they were not but everyone knew that informally they were continuously reporting to the former Prime Minister.

5.9 Two Governors Resign—On 1 May 1996 a written submission was filed pointing out several press reports which mentioned that the Jain Diaries indicate that two sitting Governors (Governor of Uttar Pradesh Shri Moti Lal Vora and Governor of Kerala Shri P. Shiv Shankar) were alleged to have received payments from the Jains when they were public servants from the Jains. Under the Indian Constitution the Governors enjoy an immunity from criminal prosecution when they hold office. It was queried as to why the CBI had not reported to the President of India to take appropriate action against these two sitting Governors because if they had done so promptly the President might have dismissed the Governors or forced them to resign. The CBI was charged with deliberate inaction.

5.10 It was submitted that the inaction by the CBI and its Director expose them to grave criticism and lead to the reasonable conclusion that they are even now, after all this criticism, not carrying out their duties diligently as required by law.

5.11 After this application was made the CBI through the Solicitor-General told the Court that the investigation against both the Governors were substantially complete and the only impediment was the constitutional immunity they enjoyed under article 361. Next day the news broke in the national press. Both the Governors promptly resigned and were thereafter charge-sheeted.

VI

CONCLUSION

6.1 Ruling Party Loses Election—By April 1996, the Jain Hawala scandal had become a by-word in every household in India and the reputation of the ruling Congress politicians was gravely damaged. The case had given a body blow to the ruling party headed by Prime Minister P.V.N. Rao. The election results showed that the ruling Congress which was enjoying about half the seats in the Lower House of Parliament was decimated at the polls and its strength was reduced by half and it was voted out of office.

The main case is still continuing because the Supreme Court of India does not close the case unlike the traditional method of argument and judgment. The case is adjourned from time-to-time and the authorities are directed to report further. Meanwhile some of the politicians/accused have been discharged in trials initiated in the Criminal Courts.

The Future

6.2 The New Procedure of Monitoring—As a result of the procedure and the method adopted in this case several High Courts in the States have adopted similar procedures where high political dignitaries are involved in serious allegations of corruption. The case is a role model and has now enthused citizens and the judiciary to question and direct investigations against political corruption. The case has been a trendsetter as an effective remedy to activate investigation against politicians.

6.3 The above litigative model and judicial intervention has led to (a) *JMM Bribery Case* (arising out of a petition in the Delhi High Court) where former Prime Minister Narasimha Rao is charged with bribing Members of Parliament

to influence voting during a No Confidence Motion; (b) A defalcation and misappropriation case in the State of Bihar running into 9 billion rupees (about US \$ 250 million) where the Chief Minister is allegedly involved arising out of a petition in the High Court of Patna.

6.4 Will this process succeed in getting convictions? One must realise that Indian Courts function under a common law system. Unlike the civil law system, the magistracy does not have inquisitional or investigative powers. India has no institution or system like elected independent District Attorneys as in USA. But this is only a first step in the many battles to be fought. As a result of sloppy investigation and deliberate loopholes many of those charged may well escape punishment. In the event, the demand for independent autonomous investigative agencies and Special Prosecutors nominated by Courts will gather strength and will be the next battle to be joined.

The Rights of the Accused

6.5 The petitioners have always maintained that once a trial starts the rights of the accused to fair procedure and unbiased trial in accordance with law are sacrosanct and the accused's rights must be jealously preserved. The Courts are very solicitous of the rights of the accused. The Supreme Court has repeatedly said that whatever they have said during the course of *Jain Diaries'* case ought not to influence the criminal trials.

VII

SUMMATION

7.1 **Unanswered Issues**—However, there are many unanswered questions. One of the most important one which we have raised in the litigation is how to insulate the investigative and enforcement and police agencies from being subordinate to the political executive? Would the Courts be able to lay down guidelines (which the Supreme Court has done in several other matters) to create a structure by which the rule of law can vigorously be maintained and enforced? Is it possible to put in place investigative agencies against politicians, past, present or future, to be able to function in an autonomous way guided by the Court process?

7.2 The *Jain Diary* case has radically transformed Indian jurisprudence. There has been great enthusiasm in the citizenry and the public because the Courts are now willing to step into an area from which they had excluded themselves wholly in the past an area where political leaders were involved in financial scams. The Courts used to take the view that the matter was being dealt with by the investigative agencies and judicial review would not be possible in areas which were not judicially manageable. That barrier has now been decisively and clearly broken by the Indian Supreme Court. They have evolved a procedure by which powerful and corrupt politicians are not above the law. The highest Court has proclaimed:

“Be you ever so high, the law is above you”.

A great blow in favour of judicial review with its expanding horizons.

31

The Fight Against Corruption v. The Attorney – Client Privilege – An Indian Perspective

*This paper was prepared for a conference in New Delhi in 1999.
It deals with the attorney–client privilege, searches and seizures in
Indian Law and related Indian cases.*

I

INTRODUCTION

- 1.1 The theme of this session suggests a tension, a conflict between the battle against corruption and the client's privilege against disclosure. It postulates that the immunity from disclosure of professional communications impedes and obstructs the unraveling of the truth and the ascertainment of the facts and thwarts efforts to bring corrupt officials to justice.
- 1.2 This is an issue and a topic of very little relevance in India. There are no reported cases where this conflict between detection of corruption and the claim of professional privilege have reached the Indian Courts. What is relevant and of moment in India is how to bring to justice and punish the corrupt politician and the erring bureaucrat. There are other systemic factors that impede nay neutralize efforts to fight corruption in high office.
- 1.3 It is in this context that I have taken the liberty of discussing the fight against corruption somewhat independently of professional privilege while not neglecting to discuss the ambit scope and dimensions of professional privilege under Indian Law.

II

WHY THE ATTORNEY–CLIENT PRIVILEGE?

- 2.1 The historical origin of the lawyer-client privilege takes us back a few hundred years to the reign of Elizabeth I. It was based on the honour and duty of an attorney. "The first duty of an attorney" it was said "is to keep the secrets of his clients". The attorney and the barrister were under the solemn pledge of secrecy to keep the secrets of their clients.
- 2.2 Lord Bacon said:

“The greatest trust between men and men is the trust of giving counsel.”

- 2.3 Gradually, the emphasis shifted from the attorney’s honour and duty to the client’s right and privilege. The client must have the freedom to consult and the security of confidentiality. Such a privilege was regarded as in the interests of the administration of justice. The client needed the advice and guidance of a trained professional.
- 2.4 Could this privilege stand against the Court’s duty to search for and ascertain the truth?
- 2.5 Because of the complexity and difficulty of understanding the law, a client needed trained professional men to enforce his right or to defend himself. And for protecting his rights he should be able to place unrestricted and absolute confidence in the professional adviser.
- 2.6 The judicial system requires the aid of honorable, enlightened and skilled practitioners learned in the law for the efficient administration of justice. Clients must be encouraged to employ them and it is indispensable that clients communicate all facts to their legal advisers without fear that they may be used against them.
- 2.7 In an old English case it was mentioned that:

“the foundation of this rule is not difficult to discover. It is not as has sometimes been said on account of any particular importance which the law attributes to the business of legal professionals. But it is out of regard to the interest of justice, which cannot be up-holden and to the administration of justice which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts and in those matters affecting the rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources, deprived of all professional assistance, a man would not venture to consult any skillful person or would only dare to tell his counsellor half his case”.
- 2.8 A modern justification and basis of the privilege is exhaustively discussed in 1989 by the Federal Court of Australia in *Commissioner of Taxation and Citibank Limited* (20 FCR 403). Citibank premises in Sydney were raided under the Income-tax Assessment Act. The Taxation Authorities were investigating a taxation avoidance scheme relating to off-shore preference share arrangement.
- 2.9 Armed with authorities under the Income Tax Act, the officers searched the premises. The Court held that Citibank was denied the opportunity to make adequate claims for privilege in relation to the documents of its clients.
- 2.10 It was held that Citibank, as bailee of its clients and its custodian was obliged to claim privilege which attached to the documents and “one may say, once privileged always privileged”.
- 2.11 The jurisprudential basis of the attorney-client privilege was modernised and explained by the Australian Court as under:

- The multiplicity and complexity of the demands which the modern state makes upon its citizens underlines the continued relevance of the privilege to the public interest. Adequate protection according to the law of the privacy and liberty of the individual is an essential mark of a free society.
- Such legal professional privilege is of fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizens.
- The European Court explains the rationale of the general principle namely that the confidentiality serves the requirement, the importance of which is recognised in all of the member states, that any person must be able without constraint, consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.
- The general principle represents protection to the citizens – particularly the weak, unintelligent and ill-informed citizens against the modern State.
- The power of the Commissioner to search and make copies was read down as not referring to documents to which the legal professional privilege attached.

2.12 The High Court of Australia (Mchugh J.) in *Commissioner Federal Police and Propend Finance Pty Ltd.* (7 February 1997) observed:

“legal professional privilege is more than a mere rule of evidence . . . it is a practical guarantee of fundamental constitutional or human rights ... The doctrine is a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that the equal protection of the law is a reality.”

The attorney-client privilege thus received support as founded on a human right. It should now be part of human rights jurisprudence and should enjoy a status equal to public interest immunity.

2.13 An old English judgment observed:

“And surely the meanness and mischief of prying into a man’s confidential consultations with a legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion and fear into those communications which must take place ... are too great a price to pay for truth itself”.

2.14 As Lord Justice Knight Bruce put it pithily when he observed:

“Truth, like all other good things may be loved unwisely - may be pursued too keenly - may cost too much”.

III

THE ATTORNEY-CLIENT PRIVILEGE IN INDIAN LAW

Background

- 3.1 Controversy regarding the shielding of official corruption under the shelter of the attorney-client privilege has not found its way in Indian

Courts. There are several reasons. The enforcement of the Anti-Corruption laws against the political leadership and the top bureaucrats has been lax and lacking in will. The investigator is subordinate to the political executive. The Central Bureau of Investigation (CBI) which predominantly deals with corruption cases is subordinate to the Ministry of Personnel normally headed by the Prime Minister of India. Most investigations are, therefore, stifled at the start.

- 3.2 There is no independent and autonomous Public Prosecutor. Under the Westminster model of Parliamentary democracy followed in India, the political executive rules the roost. Inconvenient and independent investigative officers are transferred or sidelined.
- 3.3 In fact, by a secret directive called the “Single Directive” the CBI as the investigative agency could not even commence an investigation without prior approval of the head of the department and the concerned Minister. This “Single Directive” has recently been invalidated by the Supreme Court *Vineet Narain v. Union of India*, (1998) 1 SCC 226.

But in reality, because of the subordinate position occupied by the investigating officers, the ground conditions have not substantially altered. The cases hardly reach the Courts and even when they do the investigation and the prosecution would be so lacking as to leave loopholes for the defence.

The Evidence Act

- 3.4 The attorney-client privilege is embodied in the Indian Evidence Act, 1872. It was drafted by Sir James Stephen and is based on the rules of Common law then prevailing in England. It is one of the best drafted statutes and has stood the test of time and has excited the admiration and wonder of many generations of Indian lawyers for its precision.
- 3.5 Section 126, Section 129 and Section 131 relate to the attorney-client privilege.

Section 126 reads

Professional Communications

No barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure:

- (1) any such communication made in furtherance of any illegal purpose:
- (2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime

or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation

The obligation stated in this section continues after the employment has ceased.

Illustrations

- (a) *A*, a client, says to *B*, an attorney – “I have committed forgery and I wish you to defend me”.

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

- (b) *A*, a client, says to *B*, an attorney – “I wish to obtain possession of property by the use of a forged deed on which I request you to sue”.

The communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

- (c) *A*, being charged with embezzlement, retains *B*, an attorney, to defend him. In the course of the proceedings, *B* observes that an entry has been made in *A*’s account-book, charging *A* with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

Section 129 reads

Confidential communications with legal advisers

No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Section 131 reads

Production of documents which another person having possession could refuse to produce

No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

3.6 The Indian law closely follows the Common Law of England.

3.7 In sum.

- the privilege is that of the client and not the lawyers.
- the client can waive the same.
- the privilege extends to employees of the lawyers.
- the privilege basically gives immunity from disclosure in relation to the past.
- the privilege does not extend to furtherance of an illegal purpose.

IV

SEARCHES AND SEIZURES

- 4.1 The power of search and seizures is contained in several statutes. The principal statute is the Code of Criminal Procedure, which broadly empowers the Police officers to obtain search warrants from Magistrates or Judges. During the search they have the normal powers of seizing property and incriminating evidence.
- 4.2 Apart from the above, wide powers of search and seizure have been conferred under statutes dealing with collection of revenue, namely the Income Tax Act, the Customs Act, the Central Excise Act and various Sales Tax statutes in the States. Here the power can be exercised without the order of a judicial officer like a Magistrate or a Judge. However, all the statutes provide for the recording of reasons and prior approval of designated superior officers in the department.
- 4.3 Some interesting questions have arisen in relation to searches and seizures which have been decided by the Courts. After the adoption of the Constitution of India the principle of protection against self incrimination was embodied as a fundamental right under Article 20(3) of the Constitution. It states that no person accused of any offence shall be compelled to be a witness against himself. The powers of search and seizures were challenged as violative of this right and search warrants were sought to be invalidated. The Court negated the contention and held that the power of search and seizure is an overriding power of the State for the protection of the community and that the concerned statute properly and reasonably regulated the power. It was, however, held in *M.P. Sharma v. Satish Chandra*, (1954) SCR 1077: AIR 1954 SC 300, that compelled production of incriminating documents against citizens who were accused of an offence would not be permissible, but a search and seizure under the Criminal Procedure Code was not testimonial compulsion.
- 4.4 In another case *Pooran Mal v. Director of Inspection*, (1974) 1 SCC 345, certain searches were challenged as being unauthorised and illegal. An argument was advanced relying on US authorities that documents seized and evidence collected through illegal searches could not be used in a subsequent trial. The Indian Supreme Court did not follow the American cases and held that in India the test to be applied was whether the evidence was admissible under the Indian Evidence Act. The test of relevancy was the only test prescribed and there was no prohibition expressed or implied

ruling out as inadmissible documents or evidence collected by the illegal searches.

- 4.5 The above view has implications on the attorney-client privilege. No reported case deals with the question whether material collected from an attorney through an illegal search and seizure is admissible. The better view seems to be that as the Indian Evidence Act protects all privileged communications between the client and his legal adviser, such documents would be covered by professional privilege. The Indian practice would be, however, for the Court itself to examine the documents and the surrounding circumstances to decide whether the documents would be immune from production because of the attorney-client privilege.

V

INDIAN STATUTORY PROVISIONS RELATING TO CORRUPTION

- 5.1 The Mauryan Empire established by Chandragupta Maurya (321 – 297 B.C.) extended beyond the Indo-Gangetic plains covering parts of Afghanistan and Kashmir. His first Minister Kautilya (or Chanakya) has written the classic on Administration called “Arthashastra”. Kautilya discusses principles and methods of selection and screening of Ministers, Judges and officials. His now famous observation on official corruption bears quotation:

“Just as it is impossible not to taste honey or poison which finds its way on the tip of the tongue, so it is impossible for a government servant not to eat up a bit of the King’s revenue. Just as fish moving under the water cannot possibly be found out as drinking or not drinking water, so the government servants cannot be found out while taking money”.

- 5.2 The Law relating to official corruption is consolidated in the Prevention of Corruption Act, 1988. It replaces an earlier similar statute of 1947, with some important modifications.
- 5.3 Public servants are defined and include Government officers and employees of Local Authorities and government corporations, Judges, electoral officers, Court appointed Arbitrators and a person holding an office which authorises or requires him to perform any public duty in the discharge of which, the State, the public or the community at large has an interest.
- 5.4 Chapter III relates to offences and Penalties; broadly, the offences are:
- A public servant accepting or receiving any gratification in respect of an official act or duty which is other than legal remuneration (Section 7).
 - A person who accepts gratification to influence a public servant by corrupt or illegal means (Section 8).
 - A person who accepts gratification to personally influence a public servant (Section 9).
 - A public servant accepting for himself or for any other person a valuable thing free or for inadequate consideration from any person

connected with or concerned with the business and duties performed by the public servant or his subordinate (Section 11).

- Abetment, agreement to obtain or accept and even an attempt to commit any of the above offences is itself punishable.

5.5 The above offences carry a minimum sentence of six months and may extend to five years in addition to fine.

5.6 In addition, criminal misconduct is defined to include habitual acceptance of illegal gratification, dishonest and fraudulent misappropriation of public property entrusted to the public servant by corrupt or illegal means or by abusing his position (Section 13).

5.7 Most importantly, if the public servant during his period of office is in possession of property or pecuniary resources “disproportionate to his known-sources of income” for which the public servant cannot satisfactorily account the offence of criminal misconduct is committed. It carries a heavier minimum sentence of one year’s imprisonment extending to seven years.

5.8 Thus the burden of proof is cast on the public servant in two instances. First, when, the public servant has to show that any gratification received by him is legal remuneration. Secondly, the public servant has to satisfactorily account for disproportionate assets or property held by him.

5.9 Two Landmark Cases

Is a Member of Parliament a Public Servant?

Do Members of Parliament enjoy immunity from prosecution under the Constitution, if they are bribed for voting?

5.10 These questions were discussed and debated in the case, *P.V. Narasimha Rao v. State*, (1998) 4 SCC 626. The Administration of the Prime Minister Narasimha Rao took Office in 1991 without a clear majority in the Lok Sabha (House of the People). In July 1993, a No-Confidence Motion was moved. The administration required support of 14 Members to survive. Efforts were made and bribes were alleged to be given and received by certain Members of the House. In 1996, after Prime Minister Narasimha Rao was voted out of power, complaints were made and the CBI (Central Bureau of Investigation) registered four cases under the Prevention of Corruption Act, 1988 read with the Penal Code for corruption, abetment and conspiracy. Charge sheets were filed by the CBI before the Court against the former Prime Minister and others.

5.11 Before the trial could start, the Supreme Court was called upon to decide the questions:

- Whether a Member of Parliament was a ‘Public Servant’ within the meaning of the Prevention of Corruption Act?
- Whether Members of Parliament enjoyed immunity under Article 105 of the Constitution in respect of anything said or any vote given by them in Parliament or any Committee.

5.12 Article 105(2) reads as under:

“No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report paper votes or proceedings.”

5.13 The Court unanimously held that Members of Parliament were public servants. However, the majority view was that the bribe-giver enjoyed no immunity but the bribe-taker did enjoy immunity for a vote actually cast. No immunity was available to a person who received a bribe but abstained from voting. The minority held that both bribe-givers and bribe-takers enjoyed no immunity. The majority view to the extent it gave immunity to the members who voted has been widely criticised but that is the governing law.

5.14 The second case involved important questions relating to the higher judiciary.

5.15 Are Judges of the Supreme Court and the High Courts in the States “Public Servants” within the meaning of the Prevention of Corruption Act, 1947?

5.16 These questions were raised in *Veeraswami v. The Union of India*, (1991) 3 SCC 655. Veeraswami was a Chief Justice of the High Court of Madras. He was sought to be prosecuted on corruption charges under the Act of 1947. It was argued that the Act was inapplicable to Judges of the High Courts and the Supreme Court who were removable only by impeachment in Parliament. Under Section 6 prior sanction from a competent authority was required before launching a prosecution - such authority being competent to remove the Judge. A majority held that, the President of India was the competent authority to give previous sanction and the Act would apply to these Judges. The Court gave certain directions and guidelines regarding consulting the Chief Justice of India before registering a case and before grant of sanction. This was necessary to preserve the independence of the judiciary. If the allegations were against the Chief Justice of India, the Government was directed to consult any other judge or judges of the Supreme Court.

VI

THE PHENOMENON ON OF POLITICAL CORRUPTION IN INDIA

6.1 As far back as 1979, the Supreme Court of India speaking through Krishna Iyer J. said (1979) 2 SCR 476:

“The impact of summit crimes in the Third World setting is more terrible than the Watergate syndrome as perceptive social scientists have unmasked. Corruption and repression – cousins in such situations – hijack developmental processes. And in the long run, lagging national progress means ebbing people’s confidence in Constitutional means to social justice.”

The Judge continued:

“Fearless investigation is a ‘*sine qua non*’ of exposure of delinquent ‘greats’ and if the investigative agencies tremble to probe or make public the felonies of high office, white-collar offenders in the peaks may be unruffled by the law. *An independent investigative agency to be set in motion by any responsible citizen is a desideratum*”.

“Such crimes were exposed by judicial commissions before involving Chief Ministers and Cabinet Ministers at both levels and no criminal action followed except now and that of a select group. It was lack of will – not Emergency – that was the villain of the piece in non-prosecution of cases revealed by several Commissions.....”

- 6.2 The President of India, K.R. Narayanan in July, 1997 asked the citizens to fight the evils of corruption, communalism and casteism. He said that corruption is corroding the vitals of our polity and our society.
- 6.3 The former Prime Minister I.K. Gujral did one better. He termed corruption to be a bigger threat to the country than even external aggression. He called for social boycott against corrupt officials in each locality, in each village and in each town. Surprisingly, he stated that he was helpless in the matter and appealed to the citizens to help him.
- 6.4 The fight against high level corruption in India - political and bureaucratic received enormous public attention in 1996, 1997 and 1998 when the Supreme Court of India entertained and was from time to time hearing a Public Interest Litigation [called the Jain Hawala Case – *Vineet Narain v. Union of India*, (1998) 1 SCC 226. It was a first attempt generally to judicially review and enforce the law against corrupt public officials by giving Court directions to investigative agencies to vigorously pursue the investigation. The Court relied on the principle “Be you ever so high, the law is above you”.
- 6.5 The facts disclosed a cover-up. In March 1991, the Police arrested a terrorist in Delhi. It was discovered that terrorist activities were being funded from abroad. The investigation led to several simultaneous raids and searches. In one of those searches certain diaries and accounts were discovered and seized in May 1991 together with about 6 million Rupees in cash and foreign currency. The diaries and accounts revealed receipt of moneys through foreign sources and disbursement of the same to highly placed politicians and bureaucrats. No investigation, interrogation or further action was taken by the CBI for almost three years and there was an attempt to cover up. The photocopies of the diaries fell into the hands of a video journalist called Vineet Narain. As no action was being taken, a Public Interest Litigation was filed in the Supreme Court praying that the Court direct the investigating authorities to diligently investigate the cases, gather evidence and prosecute those suspected to be guilty. It was also prayed that the Supreme Court lay down guidelines to ensure autonomy to the investigative agencies who were subordinate to the political executive. A secret ‘Single Directive’, hamstringing the

investigative agencies was challenged and invalidated. The effect of the directive was that the CBI could not even start an investigation without the permission of the concerned departmental head. All investigations against high level political leaders were stifled.

- 6.6 I was concerned with the case from its start and later functioned as *Amicus Curiae* appointed by the Supreme Court. During the case three serving Cabinet Ministers, several former Cabinet Ministers, two Governors and several others resigned from office as they were charged. Ultimately, due to sloppy investigation and prosecution they were discharged but the impact of the case remained. The Supreme Court has laid down extensive guidelines in an effort to make the investigative agencies autonomous and free from political and bureaucratic interference.
- 6.7 The net effect and gain was:
- for the first time after almost 50 years of independence high ranking politicians were investigated, interrogated and when a *prima facie* case was found they were charged and had to face trial. This made the citizens aware that no one was above the law;
 - the guidelines given in the judgment of the Supreme Court ensured larger autonomy and operational independence to the investigative agencies which over a period of time will gather momentum in the future;
 - arbitrary transfers of investigative officers has been curbed to some extent; and
 - many High Courts are adopting the litigative model as structured by the Supreme Court in handling cases of political corruption. Presently two former Chief Ministers are being prosecuted for serious corruption offences apart from many other bureaucrats.
- 6.8 This is a significant but enormous first step which has expanded judicial review. The Jain Hawala Case has radically transformed Indian jurisprudence. There has been great enthusiasm in the citizenry and the public because the Courts are now willing to step into an area from which they had excluded themselves wholly in the past — an area where political leaders were involved in financial scams. The Courts used to take the view that the matter was being dealt with by the investigative agencies and judicial review would not be possible in areas which were not judicially manageable. That barrier has now been decisively and clearly broken by the Indian Supreme Court. They have evolved a procedure by which powerful and corrupt politicians are not above the law. A great blow in favour of judicial review with its expanding horizons.
- 6.9 The battle for honest governance must go on and active involvement of citizens, honest bureaucrats and independent and fearless judges is the need of the hour.
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Combating Corruption – A Global Overview

This presentation was made for the National Seminar on Combating Corruption held from 28-30 April 2000 at New Delhi. It deals with how corruption has been fought in other jurisdictions like the USA, Hong Kong, Australia, Singapore, South Korea, Thailand and Italy.

It also deals at length with the Jain Hawala case (Vineet Narain v. the Union of India).

I

INTRODUCTION

- 1.1 Corruption so rampant in India is an evil which has to be fought. In a democracy the only way of fighting corruption is through constitutional means and by creating a vibrant public opinion. The Deputy Chairman of the Rajya Sabha Najma Heptullah is to be congratulated for her frankness when she wrote “Only those who have the money to buy MLAs – and mind you, they do not come cheap, the going rate in the recent Rajya Sabha elections was Rs. 20 to 50 lakhs can resort to it”. (*The Times of India*, 9th April, 2000).
- 1.2 President Narayanan in July 1997 made an impassioned plea to fight the evils of corruption, communalism, casteism and violence. In his speech on Aug 14, 1997 he described corruption as a cancer corroding the vitals of our polity and our society (*The Asian Age*, 15 August, 1997).
- 1.3 The then Prime Minister I.K. Gujral characterised corruption as a bigger threat to the country than even external aggression. He however repeatedly said that he was helpless but exhorted the citizens to socially boycott each corrupt official in each *mohalla*, locality and village.
- 1.4 Vice President Krishan Kant while addressing the Indian Institute of Public Administration stated that there is a loot of public money and only a fraction of the government’s allocation reaches the people and corruption was the biggest source of policy failure (*The Hindu*, 27 October, 1997).

- 1.5 In February 1999, James Wolfensohn the World Bank President said:

“Bribery and corruption were not fringe issues, but a concern that must be dealt with openly, decisively and forthrightly by any nation that aspires to become a fully functioning member of the world economy”.

He made the telling point:

“We believe that central to development is the issue of governance and corruption”(The Statesman, 26 February, 1999).

- 1.6 Corruption in India is a low risk enterprise with highly profitable rewards. Justice Krishna Iyer delivering his judgment in the *Special Court's* case, (1979) 2 SCR 476 observed “corruption and repression - cousins in such situation – hijack development processes and in the long run lagging national progress means ebbing people’s confidence in constitutional means to social justice”. Justice Krishna Iyer mentioned how crimes were exposed by judicial commissions involving Chief Ministers and Cabinet Ministers at both state and central levels but no criminal action followed. He characterized this as a lack of will.
- 1.7 Every politician in India pays lip-service to eradicating corruption. Every leader exhorts the citizen as the former Prime Minister Gujral did that the citizen should carry out a campaign against corruption. By and large the politics of the country is so enmeshed in corruption that the citizen should not expect any response from people in power (whether in Government or in Opposition) to take any constructive measures to control this evil.
- 1.8 There are many strategies and measures to fight corruption *e.g.*, reducing the powers of the bureaucracy and reduction in discretionary powers and economic liberalization and privatization. This is a very wide canvas. The theme of this paper focuses on law enforcement, law reforms and the methods and structures to ensure successful investigation, prosecution and conviction of corrupt public officials.

II

A WORLD VIEW

USA

- 2.1 The experience of the world’s most prosperous and powerful democracy and the vicissitudes which the American citizen faced and the manner in which America meets the challenge of official corruption is worth emulating.
- 2.2 President Nixon’s attempt to break in at the Watergate Complex triggered an upheaval in American politics. Congress adopted the Ethics in Government Act of 1978 (Public Law 95 – 521: 95th Congress). The long title of the Act is worth reproducing. It runs:

“to establish certain Federal Agencies, effect certain reorganizations of the Federal Government, to implement certain reforms in the operation of the Federal Government and to preserve and promote the integrity of public officials and institutions, and for other purposes”. (Emphasis added)

The statute provided for extensive financial disclosures and filings by legislative personnel (Title I) by executive personnel (Title II), and by judicial personnel (Title III). It also established an office of Government Ethics (Title IV) and provided for post-retirement conflict of interest provisions (Title V) and provisions as to a Special Prosecutor (Title VI) later amended and designated as Independent Counsel.

- 2.3 The judicial officers covered by the financial disclosure provisions included the Chief Justice of the United States Supreme Court and his Associate Justices and most of the Judges of various Federal Courts; Legislative personnel included members of the Senate and House of Representatives. Thus, the highest in the land were subject to very detailed annual financial disclosures including their wealth, assets and gifts received. Such filings were also open to public inspection. From time-to-time the above statute was extended. As a sequel to the controversy arising out of President Clinton's impeachment and the criticism of the functioning of the Independent Counsel Kenneth Starr, I believe that the Act or some of its provisions relating to independent counsel have been allowed to lapse last year.

The Special Prosecutor in American Jurisprudence

- 2.4 It is fascinating to study the development of the concept of the "Special Prosecutor" in America. In the USA in most Districts and counties there is an elected District Attorney. Unlike the United Kingdom and India, the District Attorney has powers of investigation. The District Attorney not only prosecutes in Courts and tries cases but investigates offences and collects evidence. He has a dual function. He acts as an investigator as well as a Prosecuting Counsel. In the 1920s and 1930s and even earlier there was widespread corruption, political bossism and failure to check organized crime. What could the public do if the District Attorney or the Prosecutor himself was shielding the guilty? Over a period of time the Courts developed the doctrine of inherent power to appoint a Special Prosecutor to serve the cause of justice. Judges would appoint Special District Attorneys from outside jurisdictions and such a power was upheld in many cases. Again many State legislations and even some State Constitutions gave authority to the Governor, the Attorney-General and to Courts to make appointments of Special Prosecutors under emergent and exceptional circumstances. When the District Attorney was involved in the alleged crime of arson the Court appointed a Special Prosecutor for that case to discharge the duties of a Prosecuting Attorney (275 Ark. 376 – *Weems v. Anderson*). In another case decided in 1938 there were allegations against the Governor of a State and Courts pointed out that even the Attorney General of the State would be disqualified from investigating or prosecuting the case. The Court said (Justice Stern):

"The Attorney-General is an appointee of the Governor and subject to dismissal by him. Under such circumstances ordinary sentiments and impulses would necessarily tend to interfere with the Attorney-General's

freedom of actions, even though he might not in fact succumb to the temptations which would confront him". [In Re: *Shelley* District Attorney Supreme Court of Pennsylvania, 2 Atlantic Reporter 2d 809 (814)].

The Court also observed (Justice Maxey):

"President Judge Schaeffer of the Court below pointed out in his opinion that the Attorney-General is disqualified from serving in this case by reason of the fact that his superior officer, the Governor, who appointed and who may dismiss him at his own pleasure is charged with unlawful conduct. It is fundamental that no Attorney should permit himself to be placed in a position of trust where he has personal or other interests making antagonistic claims upon his loyalty." . . . "The Commonwealth of Pennsylvania is entitled to have as its representative in all grand jury investigations and *at every stage of the proceedings* a lawyer who can *serve it disinterestedly* and without the embarrassments or influence of personal loyalties to persons who are or may become involved in those proceedings." . . . "The Attorney General's attempt to eliminate from this investigation the duly elected District Attorney of Dauphin County, naturally gives rise to a suspicion that his (that the Attorney-General's) action is *not in the public interest* which is the only interest to which as Attorney-General he *owes fidelity*. Since the Attorney-General is admittedly not disinterested as between the Commonwealth whose servant he is and the Governor whose appointee he is and by whom he can be removed, he should not be permitted to appear officially and challenge the District Attorney's qualifications to proceed with this investigation. . . . The obvious conflict between his fidelity to the commonwealth and his loyalty to his chief makes his official participation at any stage of his case offensive to the canons of professional ethics and of good taste." (Page 819-820).

- 2.5 The American experience furnishes powerful weapons in the fight against high level political corruption and misbehaviour.

First, stringent financial annual disclosures of all assets and gifts by persons as high as Senators, Members of the House of Representatives and the Chief Justice and Associated Justices of Supreme Court of the United States.

Second, public and media access to such filings and penalties for wilfully false information being filed. This access to information is the most powerful check for the discovery of corruption and fraud.

Third, independence of the investigator and the prosecutor from those against whom there is a suspicion or an allegation of misconduct.

- 2.6 The concept of a special prosecutor (both investigator and prosecutor in the court) has been current in the USA since a hundred years and reported cases show that courts have repeatedly exercised this inherent power. Further the Ethics in Government Act snatched away the power of prosecution from the Justice department headed by the Attorney General of USA in certain cases where the President and his office itself were

under suspicion by institutionalizing the office of Special Prosecutor later called Independent Counsel.

HONG KONG¹

2.7 Hong Kong was plagued with corruption until the formation of the Independent Commission Against Corruption (ICAC) constituted under an Ordinance issued by the then British Governor. The ICAC was thus set up in February, 1974 independent of the Police and the rest of the Civil Service. It was directly responsible to the Governor of Hong Kong. It had three departments. The Operations Department which handles investigations and arrests; the Corruption Prevention Department which studies and recommends improvements in the department; and the Community Relations Department which educates the public at large. This was also coupled with the Prevention of Bribery Ordinance, 1971 (PBO). Some of the important features of this Ordinance were that there was a provision by which possession of unexplained property or maintaining an unexplained high standard of living made a Crown Servant guilty of an offence. The PBO also provided an application to the Court after conviction for confiscation of assets and property [Section 12AA (PBO).] Further the ICAC is authorized to restrict the disposal of a suspect's property by applying for a Court order against bank accounts, safe deposit boxes etc., and also empowers the ICAC to require the suspect to provide details of his financial situations and to search the premises. There are internal checks on the functioning of the ICAC. There is an Advisory Committee, a Complaints Committee and also a Community Relations Committee. Ultimately the bottom line is that the ICAC was made an independent body only answerable to the Governor and not to the normal Civil Services. It is said that prior to the establishment of the ICAC, bribery in Hong Kong was a "Second Tax" paid by citizens to secure special favours from civil servants. Since its inception there has been a dramatic decline in public sector corruption.

2.8 The then Governor of Hong Kong Lord Maclehorse said in 1973 in the Legislative Council:

"In fighting corruption good law and good practices are essential but I put my trust principally in the services of sound men".

AUSTRALIA

2.9 In Australia the Criminal Justice System broadly followed the English pattern. But since 1988 in New South Wales there has been a flurry of legislative activity. I will briefly discuss the position in New South Wales which seems to have the strongest legislative frame and structure to combat official corruption.

2.10 Two of the important statutes adopted in New South Wales are the Independent Commission Against Corruption (ICAC) Act, 1988 and the

1. Based on materials and papers prepared for 99th and 105th international seminars held under the auspices of Asia and Far East Institute for the prevention of crime and the treatment of offenders (UNAFEI).

Director of Public Prosecutions (DPP) Act, 1986. The ICAC consists of 11 parts and 122 sections. It constitutes an Independent Commission Against Corruption. Currently the Commissioner is a sitting Judge of the New South Wales Supreme Court Sir Barry O'Keefe. Corruption is very widely defined. ICAC has extensive power of investigation. It has numerous functions including investigating of complaints, communicating with appropriate authorities the result of such investigation, examining the laws governing the practices and procedure of public authorities and advising public authorities. The Commission makes findings and forms opinions but will not make a finding as to guilt or recommending prosecution. The Commission can also assemble evidence. It has extensive powers of search, issuing warrants, protection of witnesses, assisting the Commission and making reports to NSW Parliament. It has also been given powers of contempt. By Section 102 the Act has been made binding on the Crown.

- 2.11 Under the Director of Public Prosecutions Act, 1986 the Director of Public Prosecutions and Deputy Directors are appointed. The principal functions are to institute and conduct, on behalf of the Crown, prosecutions for indictable offences and also to conduct appeals. The Director has been conferred with several of the functions earlier exercised by the Attorney General of the State like filing an indictment or dropping a prosecution.
- 2.12 N.R Cowdery, Q.C., currently the Director of Public Prosecutions has described the importance of this office:

"My office was established by the Director of Public Prosecutions Act in 1986. The principal reason for creating the position was *to insulate criminal prosecutions from political interference*. . . Before that the Attorney-General had the power to discontinue a prosecution or not and his decisions had attracted considerable controversy" . . . Cowdery goes on to state " it is therefore a fair summary for me to say that the New South Wales Parliament has enacted a structure which has *effectively removed political interference from conduct of criminal prosecutions* . . . Neither I, nor the office of the Director of Public Prosecutions has an investigative function."

- 2.13 In sum, in New South Wales, ICAC and the Office of the Director of Public Prosecutions has been structured to ensure removal of political interference from the conduct of criminal proceedings. The appointment of the Director of Public Prosecutions in New South Wales is for life as contrasted with the Commonwealth Director of Public Prosecutions who has a fixed term of up to seven years.

SINGAPORE²

- 2.14 In Asia, Singapore's record in controlling corruption has been unrivalled. It is probably the cleanest in the world in terms of economic corruption. And yet the inhabitants and citizens of Singapore are predominantly of

2. Based on UNAFEI Resource Material Series No. 48 – Countermeasures to the Abuse of Power and Corruption: Some Lessons from Singapore: By Chandra Mohan.

Chinese, Malay and Indian origin. India and China and to a lesser degree Malaysia are quite high on the corruption index. There may be many causes and reasons for this phenomena. But it is clear that an honest political leadership dedicated to ruthlessly stamping out corruption can create conditions where corruption does not thrive.

2.15 The legendary Prime Minister of Singapore Lee Kuan Yew said:

“the moment key leaders are less than incorruptible, less than stern in demanding high standards, from that moment the structure of administrative integrity will weaken, and eventually crumble.”

2.16 A political leadership which sets high standards of integrity and morality is perhaps the most important factor in any fight against corruption. Singapore has adopted administrative measures to control and punish corruption in public service. There are “Instruction Manuals” which set down the norms of behaviour of public servants. These are strictly enforced and act as preventives to deviant behaviour. Secondly, work methods and procedures have been evolved to ensure effective supervision, surprise checks, rotation of officers etc. Those departments which are more exposed to corruption like officers granting permits, licenses and planning and building approvals etc., are always under close scrutiny. Thirdly, there are provisions where declarations have to be made by public officials of financial obligations and wealth at the time of appointment and annually in prescribed forms. Deterrent disciplinary procedures are in place and there are swift and severe punishments. Both the Singapore Penal Code and the Prevention of Corruption Act are vigorously enforced. In addition, Singapore has a Corrupt Practices Investigation Bureau (CPIB). It is the efficiency of this organization which has led to control of corruption. The Prevention of Corruption Act also authorizes designated officers to inspect banker’s books and compel the furnishing of information from concerned authorities and persons.

2.17 The Singapore view is that if the gains from corrupt behaviour appear to outweigh the risks involved, bureaucratic corruption is bound to rise.

KOREA³

2.18 In Korea there is no special statute exclusively dealing with corruption by public officials. According to the Ethics in Public Service Act, (1983) public officials or candidates for public office have to register their property, publicize it and report gifts which they receive during their service. There is a two year bar after retirement against getting employment in private enterprise. In 1993, the Regulation for Enforcement of Emergency Presidential Order on Real Name Financial Transaction and Protection of Confidentiality (1993) was framed. No accounts can be opened in Banks or financial institutions under a false or borrowed name. This prevents corrupt public officials holding large amounts under non-real names.

3. Based on UNAFEI Resource Material Series No. 52 – Korean Prevention System of Corruption of Public Officials and Prosecution Investigation: By Jung-Soo Lee.

Similarly in 1995 by law real estate has to be registered in the name of the person who owns it.

- 2.19 In addition, the Public Prosecutor's office is under the Ministry of Justice but is an organization independent of the Ministry. The Minister of Justice supervises administrative affairs and he is not to interfere with operational and prosecutorial processes. Public Prosecutors are not subject to suspension or dismissal from service or reduction of salary unless it is a consequence of impeachment, sentence or disciplinary action. Public Prosecutors can themselves conduct investigations in case of special offences such as corruption of public officials, etc. Other criminal investigations are done by the normal police authority. There are special investigation cells where only the investigating prosecutors are admitted and other fellow prosecutors are restricted from entry.
- 2.20 In January 1995, a Special Act was enacted after large scale embezzlement by revenue officers in Inchon. This Act has far reaching provisions in relation to confiscation of proceeds of corruption from public officials.
- 2.21 A notable and high profile case of graft in South Korea involved a former President Roh Tae Woo. The case related to slush funds of USD 500 million kept under fictitious names by the former President which were sought to be legitimized after the enactment of the Real Name Financial Transaction Regulation of 1993. The former President Roh on the slush funds being traced made an "apology" speech stating that he had received about USD 630 million during five years of his Presidentship.
- 2.22 In sum, the legislative framework in relation to prohibition from holding fictitious name accounts, fictitious name real estate and right to confiscate property and the independence of the public prosecutors are features worth noting.

THAILAND⁴

- 2.23 The Thais call bribery "Jin Muong" (Nation eating).
- 2.24 Thailand is not one of those countries where there has been great success in combating corruption. The laws and investigations in Thailand are dilatory and investigations in corruption cases are called "easy to start but hard to finish". In spite of investigation of unusual wealth cases in Thailand for a variety of reasons the enforcement has been ineffective.
- 2.25 One of the deficiencies noted in the Thai system is the lack of systematic development and knowledge and ability to follow up changes in financial and accounting technology so as to be able to investigate the accused person's money and property efficiently.

ITALY

- 2.26 The "Clean Hands" Campaign commenced by a dedicated judiciary consisting of a dynamic Magistracy from the city of Milan is legendary.

4. Based on UNAFEI Resource Material Series No. 52 – Investigation of Unusual Wealth Cases in the Thai Government: By Dr. Prasit Damrongchai.

It was a crusade to clean up public life which started in Milan called the city of kick backs (Tangento Poli). In that campaign many former Prime Ministers, leaders of industry and powerful politicians bit the dust. A determined judiciary was successful in curbing through constitutional and legal means, corruption in high places and bring to book and project on the national agenda the evil nexus between politicians, criminals, mafia and businessmen. Though the campaign has stalled a bit, it is a path-breaker. The manner in which a band of intrepid, fearless and dedicated judicial officers utilized the existing legal frame to curb corruption commands our admiration.

III

THE JAIN HAWALA CASE

3.1 In India, the judicial attitude against high level political and bureaucratic corruption has dramatically changed after the Supreme Court hearings and judgment in the *Jain Hawala Case*, (1998) 1 SCC 226 – *Vineet Narain v. Union of India*. The Jain diaries were caught as a sequel to investigations arising from the arrest of one Ashfak Hussain Lone, Deputy Chief of Intelligence of a terrorist organisation (Hizbul Mujahiddeen) operating in Kashmir. The net-work of Hawala receipts in India were through the same channels as the funding of terrorist organisations from Dubai and London. The involvement of high profile politicians and high level bureaucrats was a protective umbrella against a vigorous enforcement. After many hearings the CBI filed charge-sheets in January 1996 against Cabinet Ministers, the then Leader of the Opposition and politicians of diverse hues.

3.2 Chandan Mitra in his “The Corrupt Society” says:

“The sting may have gone out of the hawala case following the High Court verdict, but when the then Prime Minister Narasimha Rao gave the green signal to the CBI to file the cases in January 1996, India was rocked by a political tremor of unsurpassed magnitude. The BBC described it as the biggest political earthquake to have hit independent India.”

He further goes on to say:

“From all accounts the public came to the conclusion that most of those named in the diaries actually received some bribes, even if a few were framed. Similarly, few had expected the CBI to actually prove the *quid pro quo*, essential to establish bribery.”

3.3 The fall-out of the *Jain Hawala Case* is significant. High Courts following the litigative model adopted by the Supreme Court, have taken up among others, the case of the *Fodder Scam*, the *Urea Scam*, the *JMM Bribery Case*. The former Chief Minister and former Ministers in Tamil Nadu have been convicted. Prosecutions are going on against the former Chief Minister of Bihar. A former Prime Minister Narasimha Rao is also facing trial in the JMM bribery case.

3.4 The net gains may be pinpointed as under

- For the first time after almost 50 years of independence high-ranking politicians have been investigated, interrogated and when a *prima facie* case is found they have been charged and had to face trial.
- There is a distinct momentum towards larger autonomy and independence of the investigating agencies.
- Arbitrary transfers of Investigating Officers have to some extent been curbed by the structure laid down by the Supreme Court.
- Many High Courts are adopting the litigative model as structured by the Supreme Court in handling cases of political corruption.
- The enactment of the CVC (Central Vigilance Commission) Ordinance (now lapsed) gives a measure of autonomy and distances the investigative agencies from the political executive.
- There is a movement for a legislative framework to attach and sequester assets and wealth collected and accumulated by people in power which are wholly disproportionate to their sources of income.

IV

FAILURE OF THE JAIN HAWALA PROSECUTIONS

- 4.1 On 18th December 1997, judgement was delivered in the case of *Vineet Narain v. Union of India*, (1998) 1 SCC 226 (*The Jain Hawala Case*). It was a landmark judgement under which the Supreme Court of India gave directions and guidelines to ensure greater freedom and autonomy to agencies investigating crimes committed by powerful politicians, bureaucrats and others.
- 4.2 A structure was framed giving extensive powers to the Central Vigilance Commission, the Central Bureau of Investigations (CBI), the Enforcement Directorate, the Nodal Agency. Equally importantly the Supreme Court struck down what had come to be known as the Single Directive - the effect of which was that no investigation or even inquiry could be commenced by the CBI against specified high level bureaucrats without previous sanction from the Head of the concerned Department. In effect all such investigations were strangled and derailed at the initial stage.
- 4.3 Let me start by posing a few questions which are frequently put to me:
- 4.4 Is the Jain Hawala Case Over?
Yes, final judgment was given on 18th December, 1997.
- 4.5 Was any Politician convicted?
No.
- 4.6 Why have so many politicians been discharged?
First the CBI's investigation left much to be desired and there remained many loopholes.
- 4.7 Why is it that in spite of monitoring by the Supreme Court there were 'loop holes'?

The answer is in the Supreme Court Judgment itself. The Court was only asking the investigative agencies to report; it did not direct the manner, mode and persons against whom the investigation was to be done.

The judgment states: (1998) 1 SCC 226 (243) (para 13).

“During the monitoring of the investigations, the Solicitor-General/ Attorney-General, from time-to-time, reported the progress made during the course of investigation, in order to satisfy us that the agencies were not continuing to drag their feet and the “continuing mandamus” was having the effect of making the agencies perform their statutory function. The procedure adopted by us was merely to hear what they had to report or the CBI Director and the Revenue Secretary had to tell us to be satisfied that the earlier inaction was not persisting. We maintained this stance throughout. We also ensured that no observation of any kind was made by us nor was any response given which may be construed as our opinion about the merits of the case or the accusation against any accused. We also did not identify or name any accused during performance of this task.”

- 4.8 The Supreme Court in the judgment itself in para 50 (1998) 1 SCC 226 (264-265) has stated:

“The recent experience in the field of prosecution is also discouraging. To emphasise this point, some reference has to be made to a large number of prosecutions launched as a result of monitoring by the court in this matter which have resulted in discharge of the accused at the threshold. It took several years for the CBI to commence investigation and that too as a result of the monitoring by this Court. It is not as if the CBI, on conclusion of the investigation, formed the opinion that no case was made out for prosecution so that the earlier inaction may have been justified. The CBI did file numerous charge-sheets which indicated that in its view a *prima facie* case for prosecution had been made out. This alone is sufficient to indicate that the earlier inaction was unjustified. However, discharge of the accused on filing of the charge-sheet indicates, irrespective of the ultimate outcome of the matters pending in the higher courts, that the trial court at least was not satisfied that a *prima facie* case was made out by the investigation. *These facts are sufficient to indicate that either the investigation or the prosecution or both were lacking.* A similar result of discharge of the accused in such a large number of cases where charge-sheets had been filed by the CBI *is not consistent with any other inference.* The need for a strong and competent prosecution machinery and not merely a fair and competent investigation by CBI can hardly be overemphasised”.

- 4.9 The remarks of the Special Judge Shri V.B. Gupta as reported in the Press are worth recalling in one of the last prosecutions arising from the Jain Hawala Case where the accused was discharged in September 1998. Said the judge:

“Looking from any angle, it stands clearly established that, *prima facie*, no offence under Section 13(1)(d) of the Prevention of Corruption Act,

1988, is made out against Mr. ____”

“However, I fail to understand what prevented the prosecution from conducting investigation under Section 13(1)(e) of the Act against the accused when the allegations made in the charge sheet, *prima facie*, show the commission of offence under this sub-section.” [Section 13(1)(e) deals with assets disproportionate to income].

The Judge further said that these allegations *prima facie* showed the commission of offence under Section 13(1)(e) “but the prosecution, for reasons best known to itself, has chosen not to conduct investigation on these lines.” (*The Times of India* - September 8, 1998)

- 4.10 It is clear that the CBI deliberately did not do its job because it is only an arm of the same set of politicians and bureaucrats who shield each other. The CBI and its officers cannot act because they are subordinate to these very persons. Unless they have complete autonomy, no fear of reprisals by way of transfer or otherwise and no danger real or perceived to their career prospects, the CBI officers cannot function fearlessly, independently and efficiently bringing the dishonest to book. Both the investigation and the prosecution must be independent and free from political and bureaucratic control. This need is only partly fulfilled by the appointment of Special Prosecutors and Independent Counsels in many jurisdictions of USA.
- 4.11 The *J. Jayalalitha v. Union of India*, (1999) 5 SCC 138 also shows how the law was misused by the Central Government to help the accused. It is a classic illustration as to how persons in power attempted to influence a trial, shield the guilty and deflect the public interest. Judges were designated to try cases on the fast track involving former Chief Minister Jayalalitha and some of her colleagues under notifications issued by the Tamil Nadu Government. The Judges so designated were on the recommendation of the Chief Justice of Tamil Nadu. Jayalalitha and the other accused challenged these notifications. The Central Government in the High Court supported these notifications as being valid. However, when the matter was being heard in the Supreme Court the Central Government changed track and under pressure from Jayalalitha who was then supporting the Vajpayee Government issued notifications to snatch away these cases from the designated Judges and transfer them to Judges who were busy with ordinary cases in an effort to inordinately delay her trial. In fact the accused and the Central Government became collaborators in this venture contrary to the interest of the Indian Republic represented by the Union of India and the public interest. Both Jayalalitha’s counsel and the Central Government counsel strongly supported these notifications issued to derail the trials. The Supreme Court observed:

“The appellants (*Jayalalitha and the co-accused*) were happy with the said notification and, therefore, obviously did not challenge the same.”

Fortunately there was a public interest litigation commenced by VOICE which challenged these notifications and which were declared invalid by the Court. As a result the trials continued and in some of them convictions

have been obtained. A sequel has gone unnoticed. Jayalalitha pulled the rug and the Vajpayee administration fell. She aligned herself with another party in an effort to shield herself from these prosecutions. Ultimately she failed because of the verdict of the Electorate.

- 4.12 The lesson is clear. The Central Government and its counsel were unable to protect the public interest because they were in a position where their duty conflicted with their interest. They were instructed to save Jayalalitha and save the administration at the cost of the public interest of the Republic in bringing the dishonest to book, a situation which is condemned by the Pennsylvania Supreme Court in the case of *Ex-parte Shelley*, (2 Atlantic Reporter 2d 809) referred to above.

If one has to combat corruption, an Independent Investigative and Prosecuting Agency free from the control of a political administration is a must.

V

SUMMATION

- 5.1 What are the lessons to be learnt from the experience of so many countries and which is the way to go ? The experiences of many of these nations converge on certain methods and remedies.
- 5.2 First, financial disclosures by all public officials and particularly by high ranking ones is essential. All Ministers including the Prime Minister and all the Judges of the Supreme Court downwards require to follow this discipline annually. Equally the top bureaucrats should be included. If this Seminar prepares a list of offices and positions where this disclosure requirement is insisted upon it would be a step in the right direction to mobilize public opinion.
- 5.3 Second, the media, the public and any citizen should have easy access and the right to know and these financial disclosures must be made public.
- 5.4 Third, apart from these disclosures there has to be a freedom of information by legislation or by executive order or by a creative adjudication. On an appropriate payment, all documents in a particular dossier or file should be made available to the media and the public. Such disclosure will act as a powerful deterrent. Ram Jethmalani announced this decision when he was the Minister for Urban Affairs but the bureaucracy opposed it and later the proposal was shot down. In this connection my experience shows that the State of Goa which has a Freedom of Information Act has been useful. In an ongoing litigation where allegations of impropriety have been made all documents which normally would be unavailable were made available to the parties and were put before the court.
- 5.5 Fourth, all jurisdictions and countries are unanimous that there must be a powerful independent politically neutral authority or agency with a guaranteed tenure to investigate politicians and bureaucrats holding high office. The existing Police organization and prosecuting machinery including the CBI is politically compromised and owe loyalty to their

political masters and not to the public interest or the interest of the nation.

- 5.6 Fifth, how is this independence to be achieved? The Supreme Court in the *Jain Hawala* case, *Vineet Narain v. Union of India*, (1998) 1 SCC 226 laid down guidelines. These guidelines were not implemented for a long time and then were sought to be subverted by putting in place a Central Vigilance Commission Ordinance ignoring the report and recommendations of the Law Commission headed by Justice Jeevan Reddy and bypassing the Cabinet Sub Committee headed by Ram Jethmalani. Fortunately when this matter was exposed in the Supreme Court in the *Indian Bank Scam* Case the Government beat a hasty retreat and amended the CVC Ordinance to make up the deficiency. Curiously that Ordinance had been allowed to lapse and today the CVC is functioning only under an Executive Order where its wings have been clipped and which is a very diluted version of the original amended CVC Ordinance.

VI

CONCLUSION

- 6.1 Citizens must fight for a constitutional status for an Anti-corruption Commission or a CVC with the status equal to that of a Supreme Court Judge. Unless a Vigilance Commission of the status of the Central Election Commissioner, the Comptroller and Auditor General of India is fashioned, politicians will always try to derail the drive against corruption. Such an office must be supported by an independent force of investigators, Chartered Accountants and financial experts who could unravel complicated financial transactions.
- 6.2 The currently constituted CBI for diverse reasons, has proved to be wholly ineffective without the support of the judiciary. It is in fact subordinate to the political executive and acts as such. The officers manning it are liable to transfers and are always looking for post retirement positions. (A former head of the CBI, is now a Minister in Andhra Pradesh). A clean break has to be made and as in New South Wales or in Hong Kong, an Independent Authority against Corruption should be our objective.
- 6.3 Looking to the current situation in India the leadership for an anti-corruption drive will have to emanate from the Judiciary supported by strong public opinion. Members of the Bar and Bar Associations can play a useful role in supporting important causes as they have done in such effective measure in the past.
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33

The Agenda for a Post- Tehelka Clean-up – Empower the Prosecutor

*This article was published in The Indian Express on 9 April 2001.
The 'Tehelka sting operation' on corruption was a benchmark.
The article looks to the way forward, including an independent
and politically neutral authority to investigate high level
corruption and the development of the concept of a Special
Prosecutor and a Special Investigative Team.*

On March 14 the print media made shocking revelations about Defence contracts. On the previous evening the electronic media, and particularly Zee TV, first aired audiovisuals which shocked the nation. All credit to the intrepid investigative journalists who rendered an enormous service to the nation. We all knew the pervasive influence of corruption but seeing it on the TV screen leaves an indelible imprint on the mind.

Kautilya in his *Arthashastra* made the famous observation, "It is impossible for a Government servant not to eat up a bit of the King's revenue. Just as fish moving under the water cannot possibly be found as drinking or not drinking water, so the Government servants cannot be found out while taking money." Well, the Tehelka team has demonstrated that with the support of modern technology, public servants can be found out while taking money.

In India corruption is a low risk enterprise with highly profitable rewards. It hijacks economic progress and destroys people's confidence in the democratic process. The World Bank President said in February 1999: "Bribery and Corruption are not fringe issues but concerns that must be dealt with openly, decisively and forthrightly by any nation that aspires to become a fully functioning member of the World Economy." He made the telling point, "We believe that central to development is the issue of governance and corruption."

The Tehelka tapes show an all pervasive permissiveness in the awarding of defence contracts. By itself it proves very little. The events have to be supported

by the oral testimony of those who took the films and those who entered into conversation with the players. It also shows the boastful talk of certain self-confessed middlemen and influence peddlers. But I, for one, would not jump to conclusions or arrive at a sweeping generalization condemning the entire defence procurement mechanism. What has been shown to the public and what is on the website is only a small portion of the tapes. I am sure there are large parts of the tape where attempts might have been made by Tehelka team to approach other defence personnel or administrators, without making any headway. The Indian citizen should not be overly cynical until Tehelka fully reveals its failed attempts to entrap other officers. The morale of the defence services must be preserved. Further defence procurement must go ahead full swing.

The tragedy of the Tehelka expose is that the Ruling party at the highest level protests its innocence and Opposition parties merely want to attack the Government so that they can come to power and share the spoils of office. There is no positive or constructive suggestion to put in place a mechanism by which corruption can be exposed and controlled. Not a single leader in government or in opposition wants to tackle the problem forthrightly, decisively and vigorously.

The American experience furnishes powerful weapons in the fight against high-level political corruption and misbehavior. The Ethics in Government Act gives strong support by fashioning a legislative framework. First, stringent annual financial disclosures are required of all assets and gifts by highly placed Federal officials, including Senators, Representatives and the Chief Justice and Associate Justices of the Supreme Court. Second, public and media access to such filings and penalty for willfully false information being filed act as powerful checks. Third, independence of the investigator and prosecutor from those against whom there is a suspicion or an allegation of misconduct is sought to be maintained.

The Special Prosecutor in American jurisprudence was a creative judicial contribution to enforce the Rule of Law and to bring the high powered politician to book. In the 1920s and the 1930s and even earlier there was widespread corruption and organized crime in the US. In 1938 the Governor of a State was accused of corruption and he tried to displace a District Attorney prosecuting the case by his Attorney General. The Court pointed out that the Attorney General, who was the Governor's appointee, was disqualified from investigating or prosecuting the case. Many State Constitutions and Laws provide for appointment of Special Prosecutors. Many Courts have asserted the inherent power of appointing Special Prosecutors to ensure that justice prevails.

The Independent Commission Against Corruption (ICAC), constituted in 1974 in Hong Kong, furnishes a good model and has been very effective. It is said that prior to the establishment, bribery in Hong Kong was a 'Second Tax' paid by citizens to secure favours from civil servants. There has been dramatic decline in public sector corruption after its establishment. In New South Wales, two statutes have structured the ICAC and the Director of Public Prosecutions. Basically, the ICAC recommends and assembles evidence. The Director of Public Prosecutions is completely independent so as to remove political interference.

The former Prime Minister of Singapore, Lee Kuan Yew, once observed, “The moment key leaders are less than incorruptible, less than stern in demanding high standards, from that moment the structure of administrative integrity will weaken and eventually crumble.” In Thailand they call bribery “Gin Muong” (Nation Eating). The Thais call corruption cases “easy to start but hard to finish”. India has overtaken Thailand as we rarely start corruption cases and mostly finish them unsuccessfully, thanks to well crafted loopholes.

Has anyone in the Ruling party or the Opposition suggested any concrete measures to combat corruption? The answer is a categorical no. Only our universally respected President can force the issue with the ruling elite. If the lawmakers fail to put in place an adequate mechanism and if neither the Government nor the Opposition is interested in doing so, the initiative for a drive against high-level corruption has to emanate from organized citizens supported by strong public opinion and the judiciary.

In sum, the way to go is to demand an appropriate mechanism providing full financial disclosures by all public officials. Second, access to the media and the citizens of these filings. Third, the instituting of a powerful, independent and politically neutral authority like the ICAC, with a guaranteed tenure to investigate high-level politicians and bureaucrats, preferably with a constitutional status equal to that of a Supreme Court judge. And, lastly, the development of the concept of special prosecutors and special investigative teams under judicial monitoring.

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Dealing with the 2G Spectrum Scam

This article was published in the Hindu on 6 January, 2011 dealing with the 2G spectrum scam being monitored by the Supreme Court as of that date. Several prosecutions have been launched thereafter and trials have commenced.

On December 16, 2010, the Supreme Court (Justices G.S. Singhvi and Asok Kumar Ganguly) ordered a comprehensive and thorough investigation by the Central Bureau of Investigation and the Enforcement Directorate into what has become notorious as “the 2G scam.” The investigation into spectrum allocation from 2001 to 2008 would be monitored by the judges.

One is reminded of the Jain hawala case [*Vineet Narain v. Union of India*, in which the author was counsel for the petitioners and later designated as *amicus curiae*. In that case, the CBI chargesheeted three Central Cabinet Ministers and the then Leader of the Opposition in January 1996 leading to their resignation. In May 1996, the serving Governors of Kerala and Uttar Pradesh were forced to resign and were charged. The fallout of all these resignations was described by the BBC as “the biggest political earthquake to have hit independent India.” In the April 1996 elections, the Congress was reduced to 130-odd seats in the Lok Sabha and was voted out of office. However, all the prosecutions failed and most of the accused were discharged by the trial courts before the final judgment was delivered on December 18, 1997 (1998) 1 SCC 226.

The Supreme Court observed: “The recent experience in the field of prosecution is also discouraging. To emphasise this point, some reference has to be made to a large number of prosecutions launched as a result of monitoring by the court in this matter which have resulted in discharge of the accused at the threshold ... These facts are sufficient to indicate that either the investigation or the prosecution or both were lacking” (Page 264-265, Para 50).

The 2G scam has an equally explosive potential and should not result in a similar denouement. It is instructive to revisit some of the principal shortcomings of the investigations and the lessons from the past.

The CBI

Considerable effort was made in the Jain hawala judgment (Verma C.J. and Bharucha and Sen JJ). to insulate the CBI and the Chief Vigilance Commissioner from political influence and make them autonomous. But the guidelines and directions given have been circumvented and have failed to achieve that result.

Many CBI officers, past and serving, are handicapped and cannot act independently and fearlessly, being subordinate to the political executive and bureaucrats — the same set of persons who are suspects.

Where powerful persons are involved, the CBI's track record is abysmal and hopeless. Justice Santosh Hegde in the *Centre for Public Interest Litigation v. Union of India*, (2000) 8 SCC 606 (625) (*Panna-Mukta Case*) observed that the CBI had resorted to 'suggestio falsi' and 'suppressio veri' and noted that files were destroyed unauthorisedly with an ulterior motive by its officers.

An equally trenchant criticism came in the *M.C. Mehta v. Union of India (Taj Corridor Scam case)*, (2007) 1 SCC 110 (133), in which Justice Kapadia observed: "We reject the status report dated 31-12-2004 as it is a charade of the performance of duty by CBI" (Para 33).

"In matters after matters, we find that the efficacy and ethics of the governmental authorities are progressively coming under challenge before this Court by way of PIL for failure to perform their statutory duties. If this continues, a day might come when the rule of law will stand reduced to 'a rope of sand'" (Para 35).

The CBI's track record in the Jain hawala case was equally disappointing. Sanjay Kapoor's first story in the Blitz on August 10, 1991 under the caption "Top Politicos in Multi-Crore Hawala Scandal" evoked no reaction from the investigating agencies. However, while investigating terrorist funding, the CBI on May 3, 1991 carried out simultaneous raids and searches all over India. Accidentally, diaries and documents were seized from the Jains, in addition to substantial cash and foreign exchange. The diaries contained hawala entries of payment in foreign exchange made abroad and equivalent rupee payments made in India to prominent and powerful politicians, bureaucrats and businessmen easily identifiable by the initials mentioned. The diaries were a ticking time bomb which could suddenly explode and had to be covered up. The cover-up was commenced by suspending the DIG-CBI in-charge, on the allegation that he was asking for a bribe — a trap laid by the CBI with the cooperation of the Jains who, ironically, instead of being the accused, became star witnesses. The unintended and unforeseen result was that the incriminating diaries were preserved. The time bomb was only temporarily defused.

The Jains were not even interrogated till the Supreme Court intervened on a PIL petition filed by Vineet Narain, Rajinder Puri, Kamini Jaiswal and Prashant Bhushan. The authenticity of the diaries was confirmed by the CBI after the resourceful journalist Vineet Narain presented their photocopies.

The version of B.R. Lall, former Joint Director, CBI, on how the Jain hawala case was scuttled by Vijaya Rama Rao (then Director, CBI) is detailed in his book, *Who Owns CBI — The Naked Truth*.

In sum, the investigations were derailed till the court proceedings. Secondly, defective charge sheets were filed leading to the accused being discharged. Thirdly, the Enforcement Directorate and Income Tax were kept out of the picture from 1991 to about 1995, disabling them from recording statements which are admissible in evidence under FERA and Income Tax unlike those recorded by the police. The entire political establishment (ruling and opposition) closed ranks to save itself.

Skipper Cases

In the Skipper Construction cases, the Supreme Court, through a series of orders and with a continuous “hands-on” approach by Justice Jeevan Reddy, forced the investigating agencies to achieve substantial success. Some innovative approaches in those cases are worth recalling. If, *prima facie*, there was a case of bribe or loss caused by public officials by breach of the fiduciary duty or violation of law, the court attached the properties of the suspects, their spouses and dependants [(1996) 1 SCC 272; (1996) 4 SCC 622; (1997) 1 SCALE 532].

Peep into the Future

The 2G scam case may acquire contours similar to the Jain hawala case as very powerful industrial and banking lobbies will exert influence to undermine the investigations.

But in contrast, there are powerful elements in favour of unravelling the truth. The Supreme Court has adopted a “no-nonsense” approach; the CAG report cannot be wished away; the Opposition is in full cry; the electronic and print media are doing a commendable job — and it is the unremitting pressure and the continuing debate in the media that can tilt the balance and become decisive factors.

The media, however, have their faults and excesses. To recall the famous words of Chief Justice Hughes of the U.S. Supreme Court: “Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the Press ... it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.”

The media as a professional group have an inbuilt self-corrective mechanism promoted by the pressure of competition and the lure of improved ratings and readership. This hydraulic pressure is a self-cleanser and works aggressively even against media icons.

The Way Forward

First, the innovative steps in the Skipper Cases of attachment of properties for suspected bribes or breach of duty can be a potent judicial tool. Secondly, a key input would be to fashion a leak-proof mechanism (independent of the government and investigating agencies) to collect evidence from ‘whistleblowers’ and potential insider ‘approvers’ with the assistance of former police officers, CVCs, CECs and others with impeccable integrity.

Thirdly, the money trail through the money laundering, FEMA and Income Tax routes — where statements recorded during investigations are admissible — should be traced.

Our respected Prime Minister in his New Year message has promised to double efforts to make a “course correction” and cleanse our “governing processes” (The Hindu, January 1, 2011).

A long-term solution and course correction to reduce corruption will require parliamentary intervention by setting up an Independent Commission against Corruption (ICAC) with a distinct cadre of investigative officials and with an autonomous status and constitutional protection equivalent to the higher judiciary, the CAG and the CEC. A Director of Public Prosecution with similar status and protection must also be appointed. Other measures would merely be a charade.

Prime Minister Manmohan Singh, in his address to the CBI in August 2009, exhorted the agency to aggressively pursue high level corruption and change the perception that while petty cases were quickly tackled, the “big fish escaped punishment” (The Hindu, August 27, 2009). Will the investigating agencies live up to that exhortation? Can they catch the big fish? The litmus test is whether they will receive vigorous and unstinted support from the highest quarters. Otherwise, the fish will continue to feed on our national wealth.

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Lokpal Bill and the Prime Minister

This article was published in the Hindu on 1 July, 2011. It argues that the office of the Prime Minister should be brought under the purview of the Lokpal. After this article was published Justice Krishna Iyer in his article published the next day in the Hindu (2 July, 2011) inter alia stated that the Prime Minister is the custodian of considerable State power. He has to be under public scrutiny.

The Indian citizenry is up in arms against corruption at the highest levels of government. Anna Hazare's movement has caught the people's imagination. The former President, A.P.J. Abdul Kalam, has pitched in and called upon the youth to start a mass movement against corruption under the banner "What can I give?" (*The Hindu*, June 27, 2011).

According to a CRISIL report (*The Hindu*, June 29, 2011), inflation has caused the Indian public to be squeezed to the extent of Rs. 2.3 lakh crores. According to the Comptroller and Auditor General of India (CAG), the estimate of loss to the exchequer owing to the 2G spectrum scam is Rs. 1.22 lakh crores.

That corruption is a disease consuming the body politic is a fear expressed by dignitaries in India over many years. As far back as 1979, Justice V.R. Krishna Iyer observed in a judgment in his inimitable style: "Fearless investigation is a 'sine qua non' of exposure of delinquent 'greats' and if the investigative agencies tremble to probe or make public the felonies of high office, white-collar offenders in the peaks may be unruffled by the law. An independent investigative agency to be set in motion by any responsible citizen is a desideratum."

Mark the words: *fearless investigation* by an independent investigative agency against delinquent 'greats'. A good Lokpal bill has to be nothing less.

It is in this context that this article addresses the issue whether the Prime Minister should be brought under the ambit of an Ombudsman (Lokpal) and be subject to its scrutiny. It is important to observe that in most of the Lokpal bills, including the 2010 government draft (except the 1985 version), the Prime Minister is within the ambit of the Lokpal.

The Constitution

Under the Indian Constitution there is no provision to give immunity to the Prime Minister, Chief Ministers or Ministers. Under Article 361, immunity from criminal proceedings is conferred on the President and the Governor (formerly the Rajpramukh) only “during his term of office.”

So what is the principle behind such immunity being given? The line is clearly drawn. Constitutional heads who do not directly exercise executive powers are given immunity as heads of state. Active politicians such as Ministers, who cannot remain aloof from the hurly-burly of electoral and party politics, ethical or unethical, honest or corrupt, are not given any immunity. They are subject to penal laws and criminal liability.

The basic structure of the Constitution clearly denies immunity to the Prime Minister.

Internal Emergency

During the period of the Internal Emergency (1975-77), Indira Gandhi enjoyed dictatorial powers. She detained without trial prominent Opposition leaders and was supported by a captive and rump Parliament.

The Constitution (Fortieth Amendment) Bill was moved in, and passed by, the Rajya Sabha in August 1975 and later it was to go before the Lok Sabha. The Bill was blacked out from the media and hence very few people knew about it. It never became law because it was not moved in the Lok Sabha.

The Bill sought to amend Article 361 by substituting sub-clause (2) thus: “(2) No criminal proceedings whatsoever, against or concerning a person who is or has been the President or the Prime Minister or the Governor of a State, shall lie in any court, or shall be instituted or continued in any court in respect of any act done by him, *whether before he entered upon his office or during his term of office* as President or Prime Minister or Governor of a State, as the case may be, and no process whatsoever including process for arrest or imprisonment shall issue from any court against such person in respect of any such act.”

The attempt to give life-time immunity from criminal proceedings for acts done during and even prior to assuming office, of the President, the Governor and additionally the Prime Minister, did not materialise.

Foreign jurisdictions

In Japan, Prime Minister Kakuei Tanaka (July 1972 to December 1974) was found guilty of bribery and sentenced. In Israel, Prime Minister Ehud Olmert was indicted in corruption scandals in August 2009. In Italy, Prime Minister Silvio Berlusconi enacted, through a pliant legislature, a law by which he shielded himself from prosecution. The Italian Constitutional Court recently invalidated crucial parts of that law, which may result in his trial being revived.

The following are some of the main arguments against bringing the Prime Minister under the Lokpal’s scrutiny. The first one runs thus: “The simple answer is, if the Prime Minister is covered under ordinary law (the Prevention of Corruption Act), you don’t need him covered under Lokpal.” This is a view that has been attributed to the former Chief Justice of India, J.S. Verma

(*Hindustan Times*, June 27, 2011). Any misconduct by a Prime Minister can be investigated by the Central Bureau of Investigation: this view is that of Chief Minister Jayalalithaa (*The Hindu*, June 28, 2011). This objection concedes the principle that the Prime Minister is not immune from criminal liability and can be investigated, but argues and assumes that the Prevention of Corruption Act and the CBI present effective existing alternative procedures. Nothing could be farther from the truth and the ground realities.

What is the ground reality? First, the CBI, the premier anti-corruption investigative agency, is under the Department of Personnel and Training, which is controlled by the Prime Minister's Office (PMO). Secondly, the career prospects of CBI officers and other personnel are dependent on the political executive, and all officers are subject to transfer except the Director. Thus, the investigative arm is controlled by the 'political suspects' themselves. Thirdly, the Single Directive, a secret administrative directive that was invalidated by the Supreme Court in the Jain hawala case in 1997 (*Vineet Narain v. Union of India*, (1998) 1 SCC 226) has been legislatively revived. Consequently, under Section 6A of the Delhi Special Police Establishment Act, the CBI is disabled from starting an inquiry or investigation against Joint Secretary or higher level bureaucrats without the Central government's prior approval. Therefore, the Prevention of Corruption Act is a non-starter against Ministers and high-level bureaucrats who may act in concert. It is imperative that the CBI's anti-corruption wing be brought under the Lokpal and not under the PMO. This alone would meet the test of an independent and fearless investigative agency as enunciated by Justice Krishna Iyer.

Secondly, it is argued that if the Prime Minister is within its ambit, the Lokpal could be used by foreign powers to destabilise the government. Today, the checks on the executive government are the higher judiciary, which has actively intervened in the 2G spectrum scam and other scams; the CAG, whose reports against the functioning of the telecommunications sector triggered investigations into scams; the Election Commission headed by the Chief Election Commissioner, which conducted elections in West Bengal in the most efficient and orderly fashion. All these authorities could be undermined by a foreign power. Why should the Lokpal alone be the target of a foreign power? Why not the intelligence and defence services? Why not leaks from Cabinet Ministers and their offices — bugged or not?

Thirdly, it is argued that bringing the Prime Minister under the Lokpal's scrutiny would mean a parallel government being put in place. This objection is disingenuous. Do the Supreme Court and the higher judiciary constitute a parallel government? Is the CAG a parallel government? Is the CEC a parallel government? Is the CBI a parallel government? The answer is clear. These constitute checks and restraints on the political executive and the administration so that public funds are not misappropriated and constitutional democracy and citizen rights are not subverted. The Lokpal will be under the Constitution and subject to judicial review, and it is imperative that the anti-corruption wing of the CBI be brought under the Lokpal. There is no question of any parallel government. The Lokpal will be only a check on the corrupt activities of the

Executive. If all checks and balances are to be regarded as the marks of a parallel government and therefore abolished, it will be a recipe for dictatorship.

William Shakespeare wrote: "There is a tide in the affairs of men, which, taken at the flood, leads on to fortune; Omitted, all the voyage of their life is bound in shallows and in miseries." There is a tide in the affairs of this country and there is a great opportunity to promote good governance through a powerful and independent Ombudsman. India's economic reforms, for which the Prime Minister deserves approbation, should not be derailed at the altar of scams and corruption. Will his leadership ride on the tide of fortune and take the country forward to greater heights?

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The Trail of Illicit Funds

This article was published in the Hindu on 4 August 2011 giving a factual overview of the illicit /black money case as on that date. Later the Union of India applied for recalling the order by which two former judges of the Supreme Court, Justice Jeevan Reddy and Justice M.B. Shah, were to head the Special Investigation Team. The two judges hearing the case differed on the maintainability of the Union of India's application to recall; Justice Altamas Kabir (who was not a party to the earlier judgment) held that it was maintainable while Justice S.S. Nijjar (who was a party to the earlier judgment) held that it was not maintainable. The differing judgments were delivered on 23 September 2011. The third judge has not been nominated by the Chief Justice of India S.H. Kapadia upto August 2012 – Justice Sudershan Reddy retired on 8 July 2011 and the matter was assigned to Justice Altamas Kabir and Justice S.S. Nijjar by the Chief Justice of India S.H. Kapadia

On July 4, 2011, the Supreme Court (a bench comprising Justice B. Sudershan Reddy and Justice S.S. Nijjar) delivered a judgment relating to illicit money stashed in foreign tax havens. This judgment has since then received both bouquets and brickbats. An astute well-wisher suggested an article setting out the facts, and only the cardinal facts, which would dissipate the fog caused by disinformation and misapprehension, to enable the public to form an independent judgment. Justice P.N. Bhagwati, after quoting with approval James Madison, who said that “knowledge will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives,” had added: “The citizens’ right to know the facts, the true facts, is thus one of the pillars of a democratic state.”

It is essential for readers to know that this author throughout appeared ‘pro bono’ for the petitioners in that case. The petition, based on an article by Professor R. Vaidyanathan, was filed by Ram Jethmalani, MP; Gopal Sharman and Jalabala Vaidya, actors and theatre personalities; K.P.S. Gill, a former Director General of Police of Punjab; Professor B.B. Dutta, a former Congress MP; and Subhash Kashyap, a former Secretary General of the Lok Sabha.

The Petitioners' Case

The petition averred that according to the Global Financial Integrity Report, the estimated amount of illicit Indian money stashed abroad equals \$1.4 trillion (equivalent to 70 lakh crore — the figure '7' with 13 zeroes); that the U.S. government had taken vigorous steps against the Swiss bank, UBS, and as a result it agreed to pay \$780 million in fines under a "Deferred Prosecution Agreement"; that Hassan Ali Khan was alleged to have deposited over \$8 billion with UBS in Zurich and the Income Tax demand against him was over Rs.40,000 crore; and that the German government had offered to give free of charge to any government the names of its nationals who have accounts with LGT Bank Liechtenstein (an independent European country). It further stated that "the colossal failure to enforce the law and get back the stolen property of the Indian nation is due to the fact that influential politicians in most of the political parties are involved in the offences in question" and that "the Indian people have been deprived of assets which if available would substantially contribute to developmental work in India." Appropriate orders from time to time were prayed for to ensure a proper investigation.

Government's Case

The government contended that it was taking active initiatives with the G20 countries to bring about greater transparency and disclosure of information by tax havens including Switzerland by renegotiating agreements. It said that the information that had come from Germany regarding LGT Liechtenstein bank accounts was confidential under the Double Taxation Avoidance Agreement (DTAA) with Germany. Also, the 'nodal agency' as directed by the Supreme Court in the *Vineet Narain* Case based on the N.N. Vohra Committee Report to coordinate action into cases of politico-bureaucrat-criminal nexus was "currently functional;" the petitioners were not acting in a *bona fide* manner. According to the Additional Solicitor General, "the situation is totally under control" (*The Hindu*, April 23, 2009). They wanted the petition to be summarily dismissed.

Undisputed or Admitted Facts

It was admitted that a tax demand of Rs.71,848.59 crore was made against Hassan Ali Khan and his wife; that he was accused of unauthorised dealings to the extent of \$8 billion; that in view of the fact that no criminal case was pending against Mr. Ali Khan, recourse could not be taken to the Mutual Legal Assistance Treaty in criminal matters (between the Indian and Swiss governments) and thus no headway could be made at that time; that he was accused of having fraudulently obtained multiple Indian passports; that a criminal case was registered on January 8, 2007 against him and his wife for money laundering, in respect of which the letters rogatory issued in July 2009 to several countries stated that "the documents procured during investigation point towards amassing of huge funds suspected to be proceeds of crime, which have been invested in various immovable and movable assets including deposits in various banks in a number of countries around the world by resorting to the illegal process of money laundering. It further transpired that they had close relation with Adnan Khashoggi and funds deposited in the account are the proceeds from weapon sales."

Petitioners' Response

In a series of written submissions, the petitioners posed several questions. Why was the source of money of such large amounts, for which an Income Tax notice raising a demand of Rs. 71,848 crore was made, not being investigated? Why was Hassan Ali Khan not custodially interrogated after arrest? Why were investigations not undertaken to ascertain whether Hassan Ali Khan is a *benamidar* for powerful individuals? Why was nobody apprehended or interrogated in the last five years in relation to money laundering and slush funds parked abroad? Why was the Mutual Legal Assistance Treaty in criminal matters with Switzerland not invoked after a criminal investigation started? It was argued that a new protocol of 2010 with Switzerland for exchange of information would apply only to prospective information and not to past information regarding transactions and accounts in Swiss banks. This amounted to shielding wrongdoers.

Crucial Hearings

After Chief Justice K.G. Balakrishnan's retirement in May 2010, the matter gathered speed. On January 19, 2011, after perusing the confidential report/affidavit given by the respondents, the court described the money stashed abroad in foreign banks as "pure and simple theft" — "plunder of the nation" (*The Hindu*, January 20, 2011). On March 3, 2011, the court after reading the status report and the letters rogatory, remarked: "What the hell is going on in this country?" (*The Hindu*, March 4, 2011). The court was "deeply disturbed by the ongoing investigation," and remarked that Khan's questioning was done at his convenience with investigating officials putting off meetings at his behest. The court observed: "It is like a friendly chat. Why the custodial interrogation is not there?" (*The Times of India*, March 4, 2011). Only thereafter, Hassan Ali Khan and his wife were arrested on March 6/7, 2011 and custodially interrogated.

On March 8, 2011, the Solicitor General acknowledged that the concern expressed by the court was fully justified. This was widely reported (*The Hindu*, March 9, 2011). On April 25, 2011, the government produced a notification dated April 22, 2011 constituting a high-level committee of 10 officials and argued that there was now no need to set up a Special Investigating Team.

The petitioners responded in writing that this was merely a ruse and a façade to keep total and exclusive control over all investigations by bureaucrats and officials who are subservient to the political executive and cannot take action against them. The 'nodal agency' was never consulted, though four of its members were included in the high-level committee. The petitioners pressed for an independent monitoring group/team to act as the court's 'eyes and ears' as it was not possible for the court to monitor the case on a day-to-day basis.

What the Judgment Directs

The judgment retains the officials in the high-level committee as part of the Special Investigating Team, but adds two distinguished former judges of the Supreme Court, Justice B.P. Jeevan Reddy and Justice M.B. Shah, as chairman and vice-chairman respectively. The Director of Research and Analysis Wing (RAW) has been added as a member. The court also directs disclosure of names of Indians holding accounts in LGT Bank Liechtenstein, with safeguards.

The following is a summation. First, Hassan Ali Khan and his wife were not custodially interrogated for about four years and the Swiss authorities were not approached under the Mutual Assistance Treaty in criminal matters with Switzerland. Second, the nodal agency, that was "functional" since 1998, was not consulted. Third, not a single person was brought to book in respect of foreign money stashed abroad, involving issues of arms-dealing, corruption and national security. Fourth, the government had refused to disclose the names of the Liechtenstein account holders citing the DTAA with Germany, which had no application to Liechtenstein.

The attitude and inaction of the government are for every Indian to judge.

Noting the involvement of Hassan Ali and Baba Ramdev in the black money controversy, a friend asked: "You have Ali Baba. When are you catching the forty thieves?"

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Shortcomings and Malignant Provisions

*This article was published in the Hindu on 1 November 2011
relating to the Government Lokpal Bill (Bill No. 39 of 2011)
as introduced in the Lok Sabha on 4 August 2011
and its malignant provisions.*

There is unanimity of opinion that corruption at the higher levels of governance can be fought by a strong, credible, effective and independent Lokpal mechanism. As far back as 1979, the Supreme Court, speaking through Justice V.R. Krishna Iyer, observed that “corruption and repression — cousins in such situations — hijack developmental processes.” President Pratibha Patil, in her Independence Day-eve speech, lamented that “corruption is a cancer affecting our nation’s political, economic, cultural and social life. It is necessary to eliminate it.” In his Independence Day speech, the Prime Minister expressed the need for “a strong Lokpal to prevent corruption in high places.”

The Major Flaw

In the Indian system of governance, a fundamental flaw is that it is impossible for the Central Bureau of Investigation, the premier anti-corruption investigative agency that is subordinate to the Prime Minister’s Office (PMO), to even commence an inquiry or investigation into allegations of corruption against the higher bureaucracy — which often acts in concert with the political executive — without the prior approval of the Central government under Section 6A of the Delhi Special Police Establishment Act. Thus, the CBI is unable to enforce the postulate laid down by Chief Justice J.S. Verma in the *Jain Hawala* case: “Be you ever so high, the law is above you.”

The golden key to combating corruption is to fashion an anti-corruption police force completely independent of the executive.

Government Lokpal Bill

In the short space of an article, one can only highlight and emphasise a few major provisions which are insidious and malignant in the Government Lokpal Bill. Unless these are dropped, the Bill will be a ticking time bomb. It is better to have no Lokpal rather than have the one envisaged in the government Bill.

Appointment of Chairperson and Other Members

The structure of the Government Lokpal Bill is such that it gives a dominant and preponderant voice to the political executive in the selection of the Lokpal (Chairperson and members).

The Selection Committee (Clause 4) consists of the Prime Minister (Chairperson); the Speaker of the Lok Sabha (normally appointed by and owing allegiance to the ruling combination); a Union Cabinet Minister nominated by the Prime Minister; and one eminent jurist and one person of eminence in public life, both nominated by the Central government.

Thus, in a nine-member Selection Committee four will be nominees of the government, and one the Speaker of the Lok Sabha, all enjoying the confidence of the ruling party. The other four members are Leaders of the Opposition in the Lok Sabha and the Rajya Sabha, a sitting judge of the Supreme Court and a sitting Chief Justice of the High Court — both nominated by the Chief Justice of India. How will such a committee inspire public confidence or ensure a credible and independent Lokpal mechanism?

As against this, the Jan Lokpal Bill (Version 2.3) provides for a Selection Committee consisting of the Prime Minister, the Leader of the Opposition in the Lok Sabha, two judges of the Supreme Court and two permanent Chief Justices of the High Courts selected by collegiums of all Supreme Court Judges (four judicial members in all), the Comptroller and Auditor-General, the Chief Election Commissioner, and all previous chairpersons of the Lokpal.

It means a total of two politicians, four superior court judges, the CAG and the CEC. Surely, such a Selection Committee would inspire greater public confidence. The stranglehold of politicians representing the ruling combination in the Government Lokpal Bill is a highly malignant provision that requires to be summarily dropped.

Exclusion of Prime Minister

In an earlier article (*The Hindu*, July 1, 2011), I argued that the Prime Minister should be under the Lokpal. Article 361 of the Constitution grants immunity from criminal proceedings only to the President and the Governors (earlier the Raj Pramukhs) during their term of office. No immunity from criminal or civil liability has been granted to the Prime Minister. Thus the basic structure of the Constitution negates and denies any immunity to the Prime Minister.

Procedure and Opportunity to Suspected Accused

Clauses 23 to 29 completely undermine the provisions and procedures under the Code of Criminal Procedure which apply to all crimes, including crimes committed under the Prevention of Corruption Act, 1988. Under the normal procedure, the police have the power to investigate, gather physical and scientific evidence, interview and interrogate individuals who can assist the investigation and, thereafter, furnish their final report to the appropriate court under Section 173 of the Code. It is then for the court to either frame charges against the potential accused or discharge them. During the investigation and the final report (popularly known as the charge sheet), there is no question of

giving any opportunity to show cause or disclose to the accused the material or the evidence collected.

Under Clause 23, an opportunity to be heard and a copy of the complaint and material collected are to be given to the suspect at several stages before the completion of the investigation. Under Clause 24, inspection is to be allowed to the suspect when an investigation or inquiry is “proposed to be initiated by the Lokpal.” Similarly, under Clause 25, an opportunity to be heard is to be given to any person “other than the prospective accused.”

These provisions are bound to undermine effective investigation and collection of evidence. The prospective accused will act as an active terrorist to destroy the Lokpal’s efforts. Apart from going for judicial review at every stage, alleging lack of adequate opportunity to be heard, the potential accused, after inspection of the material, would have the opportunity to approach witnesses, intimidate or corrupt whistleblowers, and fabricate evidence and interfere with the investigation. These provisions are a ticking time bomb which can be detonated by the prospective accused at a time he chooses.

Inclusion of NGOs as Public Servants

Clause 17 of the government Bill and related clauses expand the definition of “public servant” to include non-governmental organisations/societies/their office-bearers who receive donations from the public. Even autonomous NGOs not controlled by the government but aided by it are brought within the definition of ‘public servant.’ This is the most mischievous provision with a view to harassing, intimidating and blackmailing NGOs/societies and their office-bearers who are the principal activists and whistleblowers under the Right to Information Act, and who are leading the movement for an effective Lokpal to curb corruption at the highest levels. These NGOs are liable under the normal criminal law and should be excluded from the definition of ‘public servant.’

Investigative Machinery and Prosecution Wing

Under the Constitution, there are checks and balances on the political and bureaucratic executives. Broadly they are the judiciary, the CAG, and the CEC. Members of the higher judiciary, the CAG and the CEC cannot be removed by the political executive except by impeachment. This secures for them an independence from the executive which enables them to invalidate, audit and check the excesses of the executive. However, the anti-corruption machinery as indicated above is completely flawed.

It is essential that either the anti-corruption branch of the CBI be transferred immediately to function under the Lokpal mechanism so that it is completely free from executive interference, or the entire CBI be brought under the Lokpal mechanism and be made subordinate to it.

Once the investigative machinery is put in place under the Lokpal, it should be a separate ‘cadre’ and none of its members should go back to or be transferred to any Central or State cadre or other investigative organisations. In substance, the Lokpal and the investigative machinery should be totally insulated and independent of all outside interference, influence, favours and patronage. If the

CBI is not under the Lokpal, turf wars and jurisdictional disputes between the CBI and the Lokpal will lead to litigation, scuttling the efficient working of the Lokpal.

Unless these fundamental flaws are eliminated, it is best to scrap the Government Lokpal Bill and continue with the present system because the remedy would be worse than the disease. The Lokpal as contemplated by the government will be misused by the executive to silence the anti-corruption movement. The efforts of civil society led by Anna Hazare will come to naught.

Compromise, accommodation and give-and-take are essential to work a successful and vigorous democracy. In conclusion, remember what Mahatma Gandhi said: "All compromise is based on give-and-take, but there can be no give-and-take on fundamentals. Any compromise on fundamentals is a surrender. For it is all give and no take."

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For CBI that Really Works

This article was published in Economic Times on 23rd March, 2013.

This article refers to Section 6A inserted in the Delhi Special Police Establishment Act, (DSPE Act) by (the CVC Act, 2003)

S.6A required CBI to obtain prior approval of the Central Government before starting an enquiry or RC against Joint Secretary level officers and above. S. 6A was invalidated as being unconstitutional and violative of Article 14 by a Constitution Bench judgment delivered on May 6, 2014 which was successfully argued by the author as 'Amicus Curiae'.

Thus, no previous approval of government is now required by CBI for starting an inquiry or a Regular Case (RC) against Joint Secretary level officers and above.

In a public interest litigation concerning manipulations in allocations of coal blocks, the Supreme Court (Justices R.M. Lodha, Madan Lokur and Pinaki Ghose) reading out portion of a confidential status report, submitted by the CBI, observed, "That an affidavit be filed by the Director of CBI that the status report submitted before this Court dated 08.03.2013 was vetted by him and nothing contained therein has been shared with the political executive..... and that the same procedure will be followed in respect of subsequent status reports..."

The Attorney General reacted, "CBI is not the last word," indicating displeasure of the government.

This interchange highlights the conflict of duties faced by the CBI. And this point was further highlighted by the responses of senior public functionaries to the CBI raiding DMK leader M.K. Stalin. The responses strongly suggested a conflict between how the CBI should function and how it actually does.

Strong Influence

In the past, the Supreme Court (Justice Santosh Hegde) observed that CBI had resorted to "suggestio falsi" and "suppressio veri" and that files were destroyed unauthorisedly with an ulterior motive by its officers.

In the Taj corridor scam case, Justice S.H. Kapadia observed, "We reject the status report dated 31.12.2004 as it is a charade of the performance of duty by CBI."

The public perception about the CBI is that it is the handmaiden of the ruling administration. The order of the Lodha bench has merely followed precedents to ensure integrity, independence and fairness of the investigation.

In the *Jain hawala* case, when an allegation was made by the petitioners that the then-Prime Minister Narasimha Rao was implicated, an unprecedented historic order was passed on 01.03.1996 (Justices J.S. Verma, S.P. Bharucha and S.C. Sen), "...it is directed that CBI would not take any instructions from, report to, or furnish any particulars thereof to any authority personally interested in or likely to be affected by the outcome of the investigations into any accusation. This direction applies even in relation to any authority which exercises administrative control over the CBI by virtue of the office he holds, without any exception."

Restrictive Regime

In the 2G scam case, Justices G.S. Singhvi and A.K. Ganguly directed, "CBI shall conduct the investigation without being influenced by any functionary, agency or instrumentality of the State and irrespective of the position, rank or status of the person to be investigated/probed."

The CBI has been constituted under the Delhi Special Police Establishment Act, 1946. It functions as a department of the central government under the ministry of personnel that is part of the PMO.

CBI works under major constraints. The first being a department of the central government, its officers are wholly subservient and dependent on the political executive for their career prospects, including transfers and promotions.

Secondly, there is a bar under Section 6A inserted by the CVC Act, 2003, from commencing even a preliminary enquiry or an investigation except with the previous approval of the central government in case of officials of the level of joint secretary and above and those appointed by the central government in the PSUs. The CBI is bound hand and foot, shackled and emasculated.

Prime Minister Manmohan Singh, addressing the biennial conference of the CBI on August 26, 2009, said, "This year's biennial conference will deliberate upon a very important issue, that of corruption in our public life... There is a pervasive feeling today in our country that while petty cases get tackled quickly, the big fish often escape punishment. This has to change."

Constitutional Cover

How to insulate the CBI from baneful interference? The best way forward is to give constitutional status to the CBI or to fashion an elite anti-corruption agency with similar constitutional protection enjoyed by the higher judiciary, the CAG and the CEC, completely independent of the Executive. In the meanwhile, CBI should be liberated from its constraints by ordinary legislation.

The US courts, in exercise of their inherent powers, have routinely displaced elected district attorneys, who have investigating powers but are amenable to

political influences and have appointed special prosecutors with investigative powers to ensure an independent and fair investigation.

Under the civil law system in France, important cases are monitored by an investigating judge who prepares a dossier and later a different trial judge is appointed.

As long as CBI works under the present architecture, there is no chance of any significant progress in catching the "big fish" or enforcing the rule of law against powerful persons.

How can the fisherman (CBI) catch the "big fish" if it cannot use its fishing net without the prior approval of the "big fish"?

Parliament – Elections

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Anti-defection Law in India

This paper was prepared for the LAWASIA Comparative Constitutional Law Conference Kathmandu, Nepal from 7-10 December 1994. It deals with the history of defection, the enactment of the Constitution 52nd Amendment Act, 1985 by which the Tenth Schedule was inserted in the Indian Constitution to quell parliamentary defections and loopholes in the system.

I

INTRODUCTION

The Indian Constitution has a federal structure with 26 States and 6 Union Territories governed by the Central Government. The Union Legislature has two Houses of Parliament, the House of the People (Lok Sabha) and the Council of States (Rajya Sabha). The former consists of about 535 members directly elected by adult franchise from different territorial constituencies. The Rajya Sabha consists of over 230 representatives elected by members of the State Legislatures.

Apart from the Parliament, each State has a Legislative Assembly and some States are bicameral and have Legislative Councils. Thus the directly elected members in the State Assemblies would be more than 4,000. The political executive at the centre functions on the parliamentary model. The President of India is the constitutional head like the English monarch. He has to act on the advice of his Council of Ministers headed by the Prime Minister of India. Thus the Council of Ministers must enjoy the confidence of the Lok Sabha and can be voted out by a no-confidence motion. The State Assemblies also function on similar lines but the Council of Ministers is headed by a Chief Minister. The Chief Minister's government must command a majority in the State Legislature or it can be voted out of power.

With so many State Assemblies, the legislatures are a fertile ground for defections or crossing of the floor or "hopping" from one side to the other.

II

BACKGROUND

A ministerial post is a coveted position. In view of major economic and regulatory powers enjoyed by the government, the scope for corruption and

kick-backs is unlimited. The lure for office and the consequent illegal economic advantages are a prize which very few legislators can resist.

In the 1970's, the problem of defections reached alarming proportions. In local Hindi parlance the legislators were called '*Aya Ram*' and '*Gaya Ram*'..... persons who cross the floor (or hop) again and again. In view of rising public criticism Parliament set up a committee to go into the malaise of defection and make a report. To quote from the report:—

“Following the fourth general election in the short period, between March, 1967 and February, 1968 the Indian political scene was characterised by numerous instances of change of party allegiance by legislators in several States. Compared to roughly 542 cases in the entire period between the First and the Fourth general election (about 17 years) at least 438 defections occurred in these 12 months alone. Among independents 157 out of a total 376 elected joined the various parties in this period. That the lure of office played a dominant part in decisions of legislators to defect was obvious from the fact that out of 210 defecting legislators of the State of Bihar, Haryana, Madhya Pradesh, Punjab, Rajasthan, Uttar Pradesh and West Bengal, 116 were included in the Councils of Ministers which they helped to bring into being by defections. The other disturbing features of this phenomenon were: multiple acts of defection by the same person or set of persons (Haryana affording a conspicuous example); few resignations of the membership of the legislature or explanations by individual defectors; indifference on the part of the defectors to political proprieties, constituency preference or public opinion; and the belief held by the people and expressed in the Press that corruption and bribery were behind some of these defections”.

Subhash C. Kashyap who was Secretary-General of *Lok Sabha*, (the House of the People) from 1984 to 1990 in his book *Anti-Defection Law* states “Between the fourth and fifth general elections in 1967 and 1972 from among 4,000 odd members of the Lok Sabha and the Legislative Assemblies in the States and the Union Territories, there were nearly 2,000 cases of defection and counter-defection. By the end of March, 1971 approximately 50 per cent of the legislators had changed their party affiliations and several of them did so more than once.... some of them as many as five times. One MLA was found to have defected five times to be a Minister for only five days. For sometime, on an average almost one State Government was falling each month due to changes in party affiliations by members. In the case of State Assemblies alone, as much as 50.5 per cent of the total number of legislators changed their political affiliations at least once. The percentage would be even more alarming if such States were left out where Government happened to be more stable and changes of political affiliations or defections from parties remained very infrequent. That the lure of office played a dominant part in this “political horsetrading” was obvious from the fact that out of 210 defecting legislators of the various States during the first year of “defection politics”, 116 were included in the Councils of Ministers in the Governments which they helped to form.”

After Indira Gandhi's assassination in October 1984 her son Rajiv Gandhi called for elections in December, 1984. He swept the polls on a massive sympathy wave. This was his first venture in electoral politics. He rapidly enacted the Anti-Defection Law as a shield to retain his own power and prevent dissidence. The Constitution (52nd Amendment) 1985 was his answer to defections. It amended articles 102 and 191 of the Constitution and also added the Tenth Schedule. These are the Constitutional provisions regarding disqualification of legislators on the ground of defection. Article 102(2) which was inserted in the Constitution provided that "a person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule". Similarly Article 191 was amended to include sub-article (2) which provided that "a person shall be disqualified for being a member of the Legislative Assembly or Legislative Council of a State if he is so disqualified under the Tenth Schedule".

The Objects and the Reasons of the 52nd Constitution Amendment Bill were stated to be "the evil of political defections has been a matter of national concern. If it is not combated it is likely to undermine the very foundations of our democracy and the principles which sustain it.... this Bill is meant for outlawing defections."

The Tenth Schedule broadly provides for (i) the grounds for disqualification; (ii) exceptions and exemptions; (iii) the machinery for decision; and (iv) jurisdiction of the Courts.

The grounds of disqualification are (a) if a legislator voluntarily gives up his membership of the political party by which he was set up as a candidate; or (b) if he votes or abstains from voting in the legislature contrary to any direction issued by the political party to which he belongs without obtaining permission. (However, the party may condone his acts within 15 days); (c) a member elected otherwise than as a candidate of a political party would be disqualified on his joining any political party after his election.

Exceptions to disqualification are broadly three-fold. *Firstly*, if there is a split in the political party (the political party here consists of the members of that party in the legislature only). A split to earn an exemption from disqualification has to be of not less than 1/3rd of members of the (original) Legislature party. If the group is 1/3rd or more of the Legislature Party it is deemed to be a new original political party. *Secondly*, if there is a merger of the political parties in the legislature the member who joins the new party or refuses to join the new party does not incur disqualification. However the merger must be supported by not less than 2/3rd of the members. *Thirdly*, if a member is elected as a Speaker or the Chairman he may in view of such position voluntarily give up his membership of the political party because of his occupying the office of Speaker or Chairman. On his ceasing to be Speaker or the Chairman he can rejoin the original political party. This giving up or rejoining does not incur disqualification.

The authority which is to decide whether there is a disqualification or not is the Speaker or the Chairman. However, when a Speaker/Chairman's disqualification is under contest, the matter has to be decided by a member elected by the House.

As far as the jurisdiction of the courts is concerned the constitutional amendment by Paragraph 7 of the Tenth Schedule provided as under:—

“Notwithstanding anything contained in this Constitution, no Court shall have any jurisdiction in respect of any matter connected with the disqualification of a Member of a House under this Schedule.”

The attempt of Parliament was to completely oust judicial review and keep the decision of the Speaker or Chairman beyond the pale of litigation and controversy.

III

JUDICIAL DECISIONS

Several cases relating to defections have reached the Supreme Court of India, the Apex Court in the judicial hierarchy. All of them have emanated from decisions relating to defections concerning State Legislators. Not a single case has reached the Courts from any controversies arising in Parliament which is the Central Legislature.

However, the law laid down in the above cases would equally govern the interpretation of the Anti-Defection Law as embodied in the Tenth Schedule to Parliamentary Defections.

The questions which have been agitated in the Court broadly are:—

- (i) The Constitutional validity of the entire Tenth Schedule;
- (ii) The finality of the decisions of the Speaker or the Chairman;
- (iii) The powers of the Court to judicially review the decisions of the Speaker or Chairman; and
- (iv) Whether the Speaker and Chairman are bound to submit to the jurisdiction of the Courts and the contempt powers of the Courts.

Punjab Assembly Case:— This case arose out of the floor crossing or “hopping” not arising out of love of lucre, but because of political differences. A political accord was reached between the Central Government led by Mr. Rajiv Gandhi and moderate Sikhs led by the then Chief Minister Mr. Surjit Singh Barnala. Because of political differences Barnala’s party namely Shiromani Akali Dal split and 27 members formed a break-away group. The incumbent Speaker did not disqualify them recognising the split. Later a new Speaker was elected and he issued notices against the break-away group for their disqualification. These members moved the High Court of Punjab.

In the Court, the entire Tenth Schedule was challenged as being unconstitutional. However, the High Court struck down as unconstitutional para 7 of the Tenth Schedule which ousted the jurisdiction of the Courts. The ground was that there was no ratification of the amendment by the State Assemblies as a constitutional amendment which ousts the jurisdiction of the higher courts requires ratification by State Assemblies which was absent. Para 6 was read down so as not to exclude judicial review by the High Court or the Supreme Court. The rest of the Tenth Schedule was upheld.

The ratio laid down in the judgment of the Supreme Court in *Kihoto Hollahon v. Zachillhu*, (1992) Supp 2 SCC 651 (which is the most exhaustive judgment on the point) may be summarised.

(1) Para 7 of the Tenth Schedule is declared invalid and unconstitutional because of lack of ratification by State Assemblies. Whenever powers or jurisdiction of the High Court and the Supreme Court are tinkered with the amendment requires ratification by State Legislatures. As the 52nd Amendment Bill did not undergo the process of ratification para 7 was declared to be unconstitutional.

(2) The rest of the Tenth Schedule was declared to be valid and constitutional. Para 7 which was struck down was regarded as severable.

(3) The argument that every elected legislator must vote according to his conscience and on occasions not follow the party whip was urged in support of a democratic right, freedom to vote and also to vote according to one's conscience. The Court held that under Indian conditions there was no vice in the Tenth Schedule which would subvert democratic rights. In fact, it was held that the Anti-Defection provisions were salutary and would strengthen the fabric of Indian parliamentary democracy by curbing unprincipled and unethical political defections.

(4) The decision of the Speakers or Chairmen on disqualification of a member was regarded as an adjudicatory function and such a function was equated with the function of a tribunal. As a result judicial review was permissible and could not be excluded.

(5) The High Courts and Supreme Court under their constitutional powers of judicial review could set aside such decisions by Speakers/Chairmen on grounds such as *mala fides*, non-compliance of rules of natural justice or even on the ground of perversity. The above decision was reached by a majority of three against two. The minority of two judges held that the entire 52nd Amendment which inserted the Tenth Schedule was unconstitutional and was an abortive attempt to amend it. The ground was lack of proper Presidential assent after obtaining the required ratification from State Legislatures.

An interesting controversy arose between the Supreme Court of India and the Speaker of the Manipur Assembly Shri Borobabu. The Speaker took up the stand under the Indian Constitution, that the privileges of the State Legislatures are those enjoyed by the House of Commons when the Constitution of India was brought into force *i.e.*, in January 1950. There are provisions in the Constitution by which the Courts do not interfere with the legislative process and procedures and similarly the legislatures do not discuss or interfere with Court proceedings. It is only after a law is enacted that the question of judicial review could be appropriately raised and decided. The contention of the Speaker was that the matter of deciding on defections fell within legislative privileges, was an internal matter and he would not submit to jurisdiction or follow the orders of the Court. The Supreme Court took a different view of its own powers and having held that the Speakers acted as Tribunals while deciding the question as to disqualification by defection, they were in that capacity bound to follow the Court orders. In fact the Supreme Court was on the point of issuing notices for contempt against the Speaker but ultimately the Speaker relented and submitted to the Court's jurisdiction.

IV

LOOPHOLES AND POSSIBLE REFORMS

The Anti-Defection Law was rushed through Parliament when the Rajiv Gandhi Government had a massive majority. He wanted to prevent defections from his own party which would threaten his position as Prime Minister. The motivation like most political motivations was for protecting his own power base rather than improving the system.

The loopholes which need to be plugged are:—

- (i) There is no precise definition of terms like “political party”, “split” or “merger”. When a defection is threatened the normal *modus operandi* is to expel some disloyal members so that those members may not be counted for the one-third members required for a split. The balance members who are expelled cannot then defect or defeat to destabilise the Government.
- (ii) Independent members who have come without support of any party are prevented from joining a political party. This is in contrast to one third group being permitted to cross floors on the basis of a split.
- (iii) Before threatening defection there is a flurry of activity and many members are expelled. Whether such expulsion is legal or illegal is not being decided by the Speaker/Chairman.
- (iv) Unlike an independent judicial body like an election Tribunal or Court the jurisdiction is exercised by the Speaker or the Chairman. Their approach is neither objective nor judicial and they lack judicial experience. The decisions betray a partisan approach and is coloured by political considerations, party loyalties and affiliations and their personal interest. If the Anti-Defection Law is to have greater impact the decisions will have to be made in a more objective, disinterested and judicial manner and should ideally be left to an independent judicial forum.

V

CONCLUSIONS

The 52nd Amendment is a step in the right direction. It has to a considerable extent controlled the daily defections which one witnessed in the Indian political scene. The Supreme Court’s interpretation of the amendment and the provisions as to defection have considerably enlarged the power of judicial review. It means that a large slice of power has passed to the higher judiciary. An interesting constitutional controversy arose when the Central Government led by Prime Minister V.P. Singh lost a no confidence motion and resigned on 7th November 1990. The succeeding Prime Minister Mr. Chandra Shekhar belonged to V.P. Singh’s party but walked out of it claiming more than 1/3rd of the original group to avoid disqualification. The matter was carried to the Speaker but before the Speaker gave his decision the Chandra Shekhar Government having won a vote of confidence on the floor of the Lok Sabha with the support of the opposition

led by Rajiv Gandhi was in office from 16th November 1990. On 11 January, 1991 when the Speaker gave his ruling, the government was well in the saddle. The Speaker's ruling was to give benefit of doubt to most of the members who had changed loyalties as a group, thereby ensuring the continuance of the new administration. The Speaker's decision was never challenged in the Court, but if it had been, momentous questions would have arisen. The Court's decision would have either knocked out or kept in place the new Administration. This illustrates how the Court's powers have been greatly enlarged—an awesome power of unseating governments and disqualifying Ministers.

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Parliamentary Privilege

This article was published in the Press Council of India's Souvenir on 16 November 2003. It deals with the publication of parliamentary proceedings and protection of such publications, defamation of members of the legislature, the English law and cases from Australia and New Zealand.

Introduction

Parliamentary privilege has many facets and dimensions. This article examines Parliamentary privilege in relation to defamatory words used in the legislature and defamation of members of the legislature by newspapers, media and outsiders in relation to their Parliamentary duties. The focus is on current issues regarding defamation in its historical context and development.

Historical Background

It is the seventeenth century. The House of Commons in England through its Speaker Mr. William Williams prints a pamphlet containing libel against the Duke of York who later becomes James II. In 1686, James II prosecutes Mr. William Williams who is fined for his actions as Speaker. The Stuart Kings of England espousing the theory of the Divine Right of Kings dislike Parliament and are in serious conflict with the House of Commons. Judicial independence is not yet established. In the Royal Courts of Justice, sit Judges who hold their office at the King's pleasure and are removable by the King and are subservient to the royal command. The Members of the Commons regard the Courts with suspicion and hostility.

In 1689 to repel the attack on their freedoms, the English Parliament made the Declaration of Rights (Bill of Rights). It was a shield against royal vengeance.

Article 9: Freedom of Speech in Parliament

The Bill of Rights 1689, Article 9 provides:

“That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament”

As has been observed in *Pepper v. Hart*.¹

“It ensures the ability of democratically elected members of Parliament to discuss what they will (freedom of debate) and to say what they will . . . the plain meaning of Article 9, viewed against the historical background in which it was enacted, was to ensure that members of Parliament were not subjected to any penalty, civil or criminal, for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they as opposed to the monarch, chose to have discussed”.

Article 9 is the cornerstone of legislative freedom. It was the assertion of the superiority of the people's representatives over the King's Courts. Members of Parliament claimed and won immunity from all laws, like seditious libel, defamation, etc., alleged to be committed while exercising their right to debate and speak in Parliament.

Publication of Parliamentary Proceedings

There was freedom of speech in Parliament but if the substance of the debates were communicated to the King as was frequently done, the member would be exposed to the King's wrath and vengeance. Secrecy of parliamentary debate and excluding strangers from the House and debating within closed doors was considered essential to ensure parliamentary independence.

Thus it would be a breach of parliamentary privileges to publish a report of its debates. With the passage of time and the denudation of the royal power, the Commons authorized the publication of parliamentary papers and reports in 1836.²

Stockdale v. Hansard

The ground was laid for a conflict between Parliament and the Courts. The leading case of *Stockdale v. Hansard*³ arose when Stockdale sued Hansard for libel. Hansard printed and published a report (by Order of the House of Commons) prepared by the Inspector of Prisons which described as indecent and obscene a book of anatomy found in the Newgate Prison library. Stockdale, the publisher of the book successfully sued for libel and Lord Chief Justice Denman held that parliamentary privilege did not extend to papers made available outside the House to members of the public even though printed and published by Order of the House. This was regarded as an attack on the privileges of the House.

The House did not accept the Court verdict and under instructions of the House, Hansard refused to comply with the judgment. So the Court ordered its officer, the Sheriff of Middlesex to enforce the judgment and the House in retaliation ordered him and Stockdale (the Plaintiff) to be committed to prison. The sequel was an application by the Sheriff of Middlesex for a writ of *Habeas Corpus* but the Court refused to issue the writ as the imprisonment was for breach of privilege. Chief Justice Dixon, High Court of Australia has pithily explained the law thus. Shortly stated it is for the courts to judge of the existence

1. (1993) 1 All ER 42 (67, 68).

2. *M.S.M. Sharma v. Sri. Krishna Sinha*, AIR 1959 SC 395 (405) para 20.

3. (1839) 9 A&E 1.

of a parliamentary privilege but, given an undoubted privilege it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. . . . If the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach is stated in general terms.⁴

Thus a Member of the House was immune from an action for libel if spoken in the House but the Court held that a publisher was liable for a libel even though acting under the orders and authority of the House of Commons.

Parliament promptly reversed this decision in 1840, by enacting the Parliamentary Papers Act, 1840. In brief, the Act gave absolute immunity from civil or criminal proceedings in respect of reports, papers, votes or proceedings published by order of either House of Parliament including copies of such publication. Abstracts were also protected if published in good faith and without malice.

Later the English Courts have held that a faithful report in the 'Times' of a debate in either House of Parliament containing matter disparaging of an individual was protected by qualified privilege as long as it was fair and honest because the debate was a matter of public concern and a newspaper had a right to make fair comments.⁵ Thus the doctrine of qualified privilege was applied to private publications.

The Indian Constitution

The Indian Constitution as originally adopted ensured substantially similar privileges and immunity to Parliament and the State Legislatures by virtue of Article 105 (for Parliament) and Article 194 (for State Legislatures).

Our legislators are given complete immunity in respect of debates, speeches and votes given in legislative proceedings. Further absolute immunity is ensured to publications by or under their authority. In addition, until defined by law, the powers, privileges and immunity enjoyed by the House of Commons on the date of our Constitution has been granted both to Parliament and the State Legislature.

The Calcutta Case⁶

A plea of qualified privilege was negated by the Calcutta High Court in a prosecution for defamation under Section 499 read with 500 of the Indian Penal Code (IPC). A speech made in the State Legislature was reported in a private publication in West Bengal. Though the Member who spoke in the House enjoyed constitutional immunity, a publication of the same by him (not authorized by the House) would not have any immunity in criminal proceedings. The High Court held that the English Rule of qualified privilege was expressly overridden by the enactment in the Indian Penal Code. Section 499 provided for qualified privilege in respect of reports of Court proceedings but there was no similar exception regarding reports of legislative proceedings.

4. *Queen v. Richards*, 92 CLR 157 (162) *per* Dixon, Chief Justice.

5. *Wason v. Walter*, 1868 (4) QBD 73.

6. *Suresh v. Punit*, 55 CWN 745.

Protection of Publications

This decision led to the enactment by the Indian Parliament of the Parliamentary Proceedings (Protection of Publication) Act, 1956. The Indian law was brought in line with the English law. Publications in newspapers and radio broadcasts of parliamentary proceedings were given immunity from civil or criminal liability provided they were substantially true, made for public good and were not actuated by malice. This statute only applied to Parliament and many states did not enact similar legislation.

During the 1975 – 1977 Emergency, the Act was repealed by Ordinance later enacted into an Act with effect from December 08, 1975. Mrs. Indira Gandhi's Government wanted no criticism made in the House published in newspapers or otherwise disseminated.

After the Janata Government came to power in 1977, the Parliamentary Proceedings (Protection of Publication) Act, 1977 was enacted and the earlier immunity restored. The lacunae of immunity in relation to private publication of proceedings of State legislatures however remained. This was remedied by the insertion of Article 361A by the Constitution (44th Amendment) Act, 1978. Immunity of reports of legislative proceedings by newspapers and wireless broadcasts was ensured, provided that they were substantially true and not proved to be actuated by malice. The immunity was from both civil and criminal proceedings.

To sum up:

- (a) there is complete and absolute immunity for members of the Legislatures in respect of defamatory statements spoken or uttered in the course of legislative proceedings;
- (b) publications regarding reports of proceedings authorized by the legislatures also enjoy absolute immunity; and
- (c) for newspaper publications and radio broadcasts there is qualified privilege as embodied in Article 361A if the reports are substantially true and it is not proved that they are actuated by malice.

Defamation of Members of Legislatures

New issues and problems have arisen with an active and inquisitive media covering every activity of the politicians. New conflicts between Members of Parliament in England and the Commonwealth countries and the media have landed up in the Courts.

If a Member of Parliament is defamed in England and the publisher desires to use and question statements made in Parliament and adopts a plea of justification how would parliamentary privilege affect the adjudication by the Courts? Would justice be done or seen to be done if parliamentary material was to be excluded as privileged from being questioned or used in Court proceedings?

United Kingdom and the Commonwealth

The conduct of members of Parliament is receiving critical attention by an inquisitive, powerful and sometimes irresponsible media. The power of the media is ever increasing and it could well ruin the political careers of promising

and ambitious members of Parliament. When defamatory statements are made by newspapers and media in relation to an MP's speeches and debates in parliament, the MP would have the right to institute a libel action. But if the defendant media relied on justification and truth as a defence could it show that the MP has lied in parliament or was otherwise guilty of improper conduct in relation to parliamentary proceedings. In England Rupert Allason filed a libel case against the newspaper "Today". The newspaper pleaded justification and wanted to rely on parliamentary proceedings. The trial was stayed by Owen, J. because parliamentary privilege would exclude parliamentary material and consequently impair the fairness of the trial. Justice Owen said that members should take the ill consequences of being an MP along with the good ones.

Neil Hamilton (MP) sued "the Guardian" for libel. The defamatory allegations were that Hamilton had accepted when an MP "cash for questions" and received hospitality at the Hotel Ritz from Al Fayed (father of Dodi Fayed who died in the motor crash along with late Princess Diana). The consideration alleged for asking questions and other parliamentary services was in relation to investigation by the Government regarding certain acquisitions by Al Fayed including the famous Departmental Store "Harrods".⁷

The action was stayed in July 1995 by May J, holding that "the claims and defences raised issues whose investigation would infringe parliamentary privilege to such an extent that they could not be fairly tried".

Parliament reacted by enacting the Defamation Act, 1996, by which waiver of privilege by a Member in court proceedings was permitted by virtue of section 13. Consequently May, J. lifted the stay. But the libel actions against *The Guardian* for several reasons collapsed and were withdrawn and never went to trial.

Meanwhile after the termination of the Guardian litigation the Parliamentary Commissioner for Standards (PCS) had made a report which was accepted by the Committee of Parliamentary Standards (CPS) and which culminated in a Resolution by the House of Commons. The findings of the PCS as accepted by the CPS and the House were adverse to Neil Hamilton though Hamilton consistently denied receiving "Cash for questions".

In January 1998, Hamilton sued Al Fayed for libel arising out of a television programme on Channel IV where Al Fayed repeated the allegations and stated that he had paid "cash for questions" to Hamilton for parliamentary services. Hamilton taking advantage of section 13 waived his privilege. The defendant Al Fayed applied to the court for striking out the plaintiff's pleadings because of the findings of the PCS accepted by the CSP and the House of Commons. The defendant argued that the action involved questioning the parliamentary proceedings and constituted a collateral attack upon parliament's investigation which had resulted in adverse findings against Hamilton. The Court of Appeal as well as the trial Judge rejected the defendant's application. The Court of Appeal held that they could arrive at a different conclusion on the facts and circumstances of the case and it would not amount to collateral attack on

7. *Hamilton v. Al Fayed*, (1999) 3 All ER 317.

parliamentary findings and proceedings. In view of the waiver under Section 13 the Court regarded the same as conclusive regarding the right of the plaintiff to sue.

Thus by enacting a right to waive the privilege, the English Parliament has given the right to Members of Parliament to vindicate their reputations by instituting a libel action.

Criticism of Section 13

The Right to Waiver given to an individual MP or former MP has been criticised. A U.K. Joint Parliamentary Committee has made its first report in regard to parliamentary privileges. The central criticism is that the privilege belongs to the House as a whole and not to any individual member. Parliamentary privilege and freedom of speech is the right and privilege of elected representatives to debate freely without apprehension of court proceedings so that they can democratically serve the electorate. The Joint Committee has recommended a new provision which would enable the whole House alone to waive the privilege but only when there is no question of a member or other person making statements in parliamentary proceedings being exposed to liability.

This recommendation means that members of Parliament who make defamatory statements enjoy immunity from defamation or other proceedings but the House as a whole alone could waive immunity in aid of a Member of Parliament who wants to sue for libel.

***Prebble v. New Zealand Television*⁸**

An interesting case from New Zealand reached the Privy Council. Television New Zealand in a programme criticized the Government and the Minister of State-owned Enterprises for sale of state owned assets to the private sector on unduly favourable terms with a view to obtaining donations for the Labour Party. The Minister Richard Prebble sued for libel the Television Company. Among the defences pleaded was that the Minister had made statements in the House of Representatives calculated to mislead the House and which were improperly motivated.

The Court of Appeal in New Zealand struck out the concerned portions of the defence as infringement of parliamentary privilege but stayed the action.

The principle behind the stay was that the defendant would be deprived of a fair trial as it would be prevented from establishing justification because of parliamentary privilege.

In modern times it is unthinkable that if the media criticizes elected representatives of the people for their misdemeanors and false statements in the House, the media should not be free to establish the truth of their criticism because of parliamentary privilege. This would have a "chilling" effect on the proper monitoring by the media and the public of actions of their elected representatives.

Surprisingly, the Privy Council in the appeal affirmed the Court of Appeal in New Zealand as regard the striking out of the concerned portions of the defence

8. (1995) 1 Appeal Cases 321; (1994) 3 All ER 407.

but lifted the stay granted by the Court of Appeal, presumably because the defence in relation to parliamentary privilege consisted of a very small portion of the case.

Conclusion

In India, there is no section 13 which allows waiver of privilege. Would the Indian Courts adopt the alternative of staying trials when a defendant is handicapped in proving justification of libel against a Member of Parliament. Parliamentary privilege would certainly apply in ousting the jurisdiction of the court but in India we have the added protection of Article 21 which guarantees a fair trial. These and other questions are likely to arise in India and it will be fascinating to see the course of developments in India on these issues.

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Mr. Speaker — The Indian “avatar”

This article was published in the Hindu on 1 August 2008. It deals with the Lok Sabha Session of 22 July 2008 when a no-confidence motion against the government of Prime Minister Manmohan Singh was being debated and where currency notes were floating around. It deals with the office of the Speaker and the Indian experience of anti-defection law. It argues that the adjudicatory roles of Speakers relating to defections, splits and mergers should be given to a neutral body.

On July 22nd, 2008 the Lok Sabha channel ratings were the highest. The Lok Sabha displayed a distressing but truthful show of our political class during the debate on the confidence vote.

The impact on one’s mind was first, a disorderly House where the Prime Minister was not allowed to speak, secondly the spectre of currency notes floating around encapsulating the condition of our entire political system and thirdly the sonorous voice and dignified mien of Mr. Speaker Somnath Chatterjee — a performance to do the Roman Senate proud in its halcyon days.

Our Constitution recognises the office of the Speaker and Deputy Speaker of the Lok Sabha who can be removed only by a resolution passed by “a majority of all the then members of the House” — not a simple majority of those present. A Speaker shall not vote in the first instance under Article 100 but shall have and exercise a casting vote in the event of equality of votes. This is equally true of the Speaker and Deputy Speaker of the Legislative Assembly. The English Speaker and the conventions under which he functions have undergone a considerable change in India. The “Speakership” has been “tropicalised” and “indigenised”. The Indian edition with some notable exceptions, is a faint carbon copy of the original. It is almost a different species at least in the Legislative Assemblies.

In England, historically, the Speaker who was the agent of the King gradually became the “eyes and ears” of the House of Commons. After the Civil War, he represented the House of Commons. When in the Seventeenth Century, Charles I arrived in the Commons to arrest the five knights for treason, Mr. Speaker Lenthall is reported to have said “I have neither eyes to see nor tongue to speak in this place, but as the House is pleased to direct me, whose servant I am here,

and I humbly beg Your Majesty's pardon that I cannot give any other answer than this to what Your Majesty is pleased to demand of me."

In England, customarily, the Speaker severs his connections with his party. A Minister does not propose him. Unofficial members propose and second him to demonstrate his independence and impartiality. He renounces active party politics, unlike India, where former Speakers Manohar Joshi and Shivraj Patil and many others at the State level continue in active party politics looking forward with "vaulting ambitions."

Speaker Betty Boothroyd an eminent Labour leader on a tied vote in 1993 on the European Communities legislation (The Maastricht Treaty) — voted in favour of the Conservative government.

The Indian Experience

According to the Parliamentary Committee Report of 1970 during the first 17 years of our Parliament and Legislatures, there were 542 cases of defection but there were 438 defections in the last 12 months. Subhash Kashyap, the distinguished former Secretary-General of the Lok Sabha states, "by the end of March 1971 approximately 50 per cent of the legislators (Lok Sabha and Legislative Assembly members) changed their party affiliations and several of them did so more than once — some of them as many as five times." In smaller States the percentage of defections would be much higher. Many got ministerial posts.

'Aya Rams' and *'Gaya Rams'* established *'Ram Rajya'* for the politician.

In this background, the Fifty Second Amendment inserted the Tenth Schedule in the Constitution to arrest defections. The objects and reasons of the amending Bill stated "the evil of political defections has been a matter of national concern. If it is not combated it is likely to undermine the very foundations of our democracy. ". The impact of the Tenth Schedule was to elevate the Speaker to the position of a Judge and discharge duties of adjudication for which the office was wholly unsuited. The 52nd Amendment Bill was introduced in 1985 on Rajiv Gandhi sweeping the polls after the assassination of Indira Gandhi. The Anti Defection Law was a shield to retain his own power and prevent dissidence. The centrepiece of the Anti-Defection Law was finality being given to the Speaker's decision and complete ouster of the jurisdiction of the courts to overturn it. Thus the ruling party through its own Speaker could disqualify dissenting members at will and perpetuate itself in power.

The Supreme Court upset this appletart and destroyed the centrepiece. The Speaker's decisions were subjected to judicial review both by the Supreme Court and the High Courts and the ouster clause was invalidated. The majority (speaking through Venkatachaliah, J.) in the leading case of Kihoto Hollohan praised the Speaker's high status quoting from English conventions and upheld part of the Tenth Schedule while invalidating the ouster clause. The minority (led by Verma, J.) struck down the Tenth Schedule in its entirety, inter alia on the ground that conferring such an adjudicatory power was contrary to the basic feature of the Constitution because the Speaker could not be impartial or objective under pressure of political compulsions and his judgment would be

biased. This dimension of the minority view proved prophetic. In a series of decisions the Speakers devalued their office and indulged in cheap party politics not unmingled with personal ambitions. All parties played the same tune. One of the low-water marks was from Goa, where Speaker Dr. Luis Barboza resigned from the Ruling Party of which he was a member, formed a new party and became Chief Minister meanwhile ensuring multiple defections.

By 1991, the position was pathetic, Speaker Rabi Ray in his decision in 1991 dealing with the Janata Party's split stated "The present goes on in the country are indeed deeply disturbing and distressing and if the situation is allowed to drift people will lose their faith in the very system."

Over 17 years have passed and the electorate has completely lost faith in the system. The Ninety First Amendment 2003, deprived the defector of a ministership or a political post but did not prevent other allurements to a venal class. The Anti Defection Law by putting adjudicatory responsibility on the Speaker has completely misfired. The Speakership under Indian conditions is totally devalued. Coalition political formations are gaining enormous strength even at the Centre and the same scenario as in the States would soon be replicated in Parliament. After all by and large active politicians have the same hue. "All men have their price", said Sir Robert Walpole, regarded as the first English Prime Minister who in 1735 started occupying No. 10, Downing Street.

If the Speaker's position is to be restored certain drastic constitutional amendments are necessary. First, the adjudicatory role of the Speaker relating to defections, splits and mergers must be entrusted with either the Election Commission or any neutral body outside the legislature. Secondly, the Speaker should resign from the party and should eschew active party politics. Thirdly, once a Speaker always a Speaker and a convention be established to re-elect him without contest. Whether there is political will at the highest levels of the major parties to carry out this reform only time can tell. Until then the Indian Speaker will neither command public confidence nor public esteem.

James Bryce wrote as far back as 1888 in his celebrated book *The American Commonwealth* that visitors returning from the USA were invariably asked the question "Isn't everybody corrupt there?" Does India fit that mould?

*Bhopal – Torts –
Hazardous Technology*

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The Bhopal Experience

This article was prepared for the LAWASIA Energy Section International Conference held in Melbourne, Australia from 2-5 October 1990. The Bhopal gas leak occurred on 2-3 December 1984 and the history of that litigation in the USA and thereafter in India are referred to. The settlement of USD 470 million is described. The challenge to the settlement as well as the new standard of "absolute liability" laid down in the Shriram Fertilizers case are referred to. The question of interim damages is also discussed.

I

Introduction

"A horrendous industrial mass disaster unparalleled in its magnitude and devastation....." – (Per Pathak, CJ)

Pesticides and hybrid seeds have ushered in a green revolution in India. But modern technologies manufacturing pesticides pose great hazards.

The Bhopal Gas Leak

On the midnight of 2nd-3rd December, 1984 MIC (Methyl Isocyanate) escaped from the pesticide factory of Union Carbide India Limited (UCIL), a subsidiary of Union Carbide Corporation (UCC), an American Corporation. The wind direction drove the gas fumes towards densely populated areas. The tragic sequel of over 2000 dead and many injured shook the entire world.

The Bhopal litigation has been a catalyst effecting quick changes – the Indian judiciary, the legal fraternity, journalists, public interest groups, the legislature and the administration have reacted and responded to the tragedy.

Issues

The Bhopal gas leak has persuaded the legislature to enact a path-breaking statute, the judiciary to formulate a new absolute standard of liability linked to the concept of punitive and deterrent damages. It has generated a debate on whether there should be a limitation of liability and more importantly views have been expressed in what manner foreign multi-national corporations should be allowed to function in India.

Some of the thoughts and views expressed are untested by experience and may be only an emotive response to the mass disaster.

These are some of the interesting issues and questions which I will try to highlight this afternoon.

II

Industrial Development and Environmental Concerns

"Sustainable development in harmony with the environment." – (Seventh 5-Year Plan).

The theme of today's session is the balance between resources development and environmental protection. The Indian government and public are intensely aware of the need for reconciling these two objectives.

Central Plans

On achieving independence in 1947, India embarked on centralised planning for industrial development. The effort was to increase the standard of life of a large section of the population which was below the poverty line. Central planning was inspired by the Soviet Five Years plans. Capital was scarce, industry was confined to small sectors like textiles, jute mills, a few cement plants and one iron and steel mill. The industrial policy assigned capital intensive industries requiring a large gestation period to the government or public sector. The private sector was confined to non-basic industries.

Large petrochemical complexes, fertilizer industries, dyestuff industries and pesticides in addition to nuclear plants are of recent origin in India. There has been a tremendous increase in India's population and the growth of industry. Deforestation, desertification, water and air pollution is the sequel.

Seventh Five Year Plan

We are in the last year of the Seventh Plan (1985-1990). The conflict between development and environment is highlighted in the Approach Paper to the Seventh Plan. It says:

"If the gains in productivity are to be sustained, resources must also continue to be available over time. This requires that, while providing for current needs, the resource base be managed so as to enable sustainable development. The basic approach to the Seventh Plan would thus be sustainable development in harmony with the environment."

"The whole planning process is aimed at development and the removal of poverty. The need to improve the conditions of our people is pressing; under this pressure many concerned with developmental activities lose sight of environmental and ecological imperatives."

III

THE BHOPAL LITIGATION

"Five years ago, this country was shaken to its core by a national catastrophe, second in magnitude and disastrous effects only to the havoc wrought by the atomic explosions in Hiroshima and Nagasaki" – (Per Ranganathan, J.)

The Bhopal litigation has run a meandering course. At the time of writing this paper (1 September 1990) the future of the litigation remains uncertain and unresolved. The settlement of US \$ 470 million is under challenge and is being reviewed by the Supreme Court at the instance of public interest groups. Hearings on the review petitions have just been concluded and judgment is awaited.

One immediate fallout of the Bhopal gas leak was the sudden appearance of a host of American lawyers. Having collected authorisations from the victims or their heirs, they proceeded to file several actions in U.S.A. Meanwhile several suits were also filed in India.

The Bhopal Act

The Indian Parliament enacted a statute called "The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985" (The Bhopal Act). An exclusive right to litigate for all causes of action arising out of the Bhopal gas leak disaster was vested in the Indian government. The Act also contemplated a machinery being set up for processing and payment of claims. Fortified by the statute, the Indian government filed a complaint in the U.S. Courts.

U.S. Actions

In May, 1986, Judge Keenan (US District Judge, Southern District of New York) dismissed all the consolidated actions in USA on the ground of "forum non-conveniens". This was conditional on UCC accepting the condition of submitting to Indian jurisdiction and waiving limitation, which it did.

The Indian Government thereupon filed a suit in the Bhopal District Court against UCC alone on behalf of all claimants.

Interim Damages

In December, 1987, the District Judge (before the commencement of the trial or recording of evidence) ordered the defendant UCC to deposit in court a sum of Rs. 3500 million (about US \$ 250 million) for payment of substantial interim compensation and welfare measures for the gas victims. The High Court of the State of Madhya Pradesh revised this amount to Rs. 2500 million (about US \$ 170 million) in April, 1988.

Overall Settlement—US \$ 470 million

UCC and the Indian Government both cross-appealed to the Supreme Court of India against this interim award of compensation. After protracted hearings, in February, 1989 a final settlement in the sum US \$ 470 million was accepted by both sides and approved by the Court. Pursuant thereto UCC brought in and paid into the Supreme Court Registry the full amount in March, 1989.

The settlement raised a great hue and cry and was attacked as a "sell-out" to a multi-national and the amount was described as woefully inadequate. The exoneration of the American and Indian Corporations and their officers of criminal liability under the Court orders also came in for strident criticism.

Bhopal Act held Constitutional

In separate proceedings, public interest groups challenged the constitutionality of the Bhopal Act as violative of the fundamental rights of the victims. In

December, 1989, the Supreme Court (a different Bench than the settlement Bench) *Charan Lal Sahu v. Union of India*, (1990) 1 SCC 613: AIR 1990 SC 1480, upheld the constitutionality of the Bhopal Act but gave an opportunity to public interest groups representing the victims to present their viewpoints during the hearings of the review petitions which had been filed independently seeking to set aside the settlement.

Indian Government's About Turn

After the general election a new Central administration took over the reigns of power in December, 1989. The new administration, unlike the previous one, took a stand (in line with its political stance when in Opposition) that it would support the attack on the settlement made by public interest groups but asserted that the money which had already been brought in court by UCC should not be returned. The hearings on the review petitions have now been concluded but the outcome will only be known when judgment is delivered.

IV

REACTIONS – RESPONSES OF THE GOVERNMENT AND THE LEGISLATURE

The Bhopal gas tragedy compressed and telescoped several legislative and regulatory developments. The principal responses were - (1) the enactment of the Bhopal Act, (2) Regulation of Hazardous Wastes, Hazardous Chemicals and Hazardous Micro-Organisms by Rules framed under the Environment [Protection] Act, (3) the introduction of the Public Liability Insurance Bill, 1990.

The Bhopal Act – An Innovative Statute

“To confer certain powers on the Central government to secure that claims arising out of the Bhopal gas leak disaster are dealt with speedily, effectively, equitably, to the best advantage of the claimants.....” (Preamble to the Bhopal Act)

The Bhopal Act vested in the Indian government the exclusive power to litigate all claims arising from the gas leak. The victim was divested of his cause of action. This included not only claims arising out of death and injury, but also claims arising out of damage to business, environment, ecology, etc.

The Indian legal system does not have any statutory provision for class actions as known in America. Under the Code of Civil Procedure, there is a provision for ‘representative suits’ which is more like relator actions in England. The conditions for instituting a representative suit are restrictive requiring numerous persons having the same interest in a suit and, therefore, cannot be equated with class actions.

The rationale behind the Bhopal Act was the duty of the State to protect its citizens analogous to the concept of “*parens patriae*” the right and duty of the sovereign to protect its weak and deserving subjects. The legislature thought that no private party could litigate against a big industrial enterprise in a complicated tort action and governmental funds, resources and expertise were absolutely

essential for effective legal action. Further, numerous suits improperly conducted would give the defendant industry a tremendous advantage in litigation and might well result in small settlements or even actions being dismissed.

The Bhopal Act is an innovative and unique statute. It has adapted the concept of "*parens patriae*" with the Central government acting as an exclusive legal representative of all claimants.

Though the Act was challenged as being unconstitutional principally on the ground that it deprived the citizen victim of his right to litigate and settle his claim, the Supreme Court of India has upheld its constitutional validity (*Sahu's* case). The statute enabled the Government to litigate against the UCC both in the United States courts as well as in the Indian courts and will serve as a future model in case of similar disasters.

Regulation of Hazardous Substances

Under a comprehensive statute called – The Environment (Protection) Act, 1986 – Rules regulating hazardous substances have been framed. These are: (1) Hazardous Wastes (Management and Handling) Rules, 1989; (2) The Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989; and (3) The Manufacture, Use, Import, Export and Storage of Hazardous Micro-Organisms, Genetically-Engineered Organisms or Cell Rules, 1989.

The United Nations Environment Programme (UNEP) Conference on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes adopted as the Final Act (22 March, 1989) "The Basel Convention". The Government of India has decided to join this international convention on transboundary movement of hazardous wastes.

Some of the provisions of the above Rules are modelled on the Basel Convention.

Eighteen categories of hazardous wastes have been regulated. The authorised occupier is obliged to ensure proper collection, reception, packing, transport, storage and disposal of hazardous wastes. Import of hazardous wastes is prohibited except for recycling or re-use by specific permission.

Over 400 chemicals and toxic materials arising from industrial activities are regulated under the Hazardous Chemical Rules. Beyond threshold quantities release of such chemicals is strictly regulated. For quick retrieval of information safety reports, safety procedures and updating of new information are required to be preserved and kept.

For hazardous micro-organisms there is a regulatory framework in respect of gene technology and micro-organisms as also management of biological disasters.

Industries, hospitals and research institutions handling hazardous micro-organisms, exporting or importing or producing or processing genetically engineered organisms have been covered under the Rules.

Specialised committees have been formed under the aegis of the Department of Biotechnology. An international centre for genetic engineering and biotechnology is functioning at New Delhi with UNIDO assistance. Several

expert and specialised committees with extensive regulatory, investigatory and prohibitory powers are being set up to monitor these activities.

The thrust is to exercise comprehensive, in-depth and effective regulatory control.

Public Liability Insurance Bill, 1990

On May 25, 1990 a Bill has been introduced in Parliament, the object of which is stated to be—

“to provide for mandatory public liability insurance for installations handling hazardous substances to provide minimum relief to the victims.”

It is to meet the growing risks of accidents from the operation of hazardous industries and processes and to provide minimum immediate relief. The cover of compulsory insurance is on the basis of “no fault” liability.

For fatal accidents the cover would be a sum of Rs. 25,000 (about US \$ 1500) per individual and medical expenses upto another Rs. 12,500 (about US \$ 750). The right of the victim to claim larger damages by suitable legal proceedings is preserved. Enterprises controlled by government or local authorities may be exempted provided a proper fund is established and maintained by them as prescribed by Rules for meeting liability on a “no fault” basis.

The Bill may well be the result of one of the suggestions made by the Supreme Court in *Charan Lal Sahu v. Union of India*, (1990) 1 SCC 613: AIR 1990 SC 1480.

V

AN IRONICAL INTERLUDE IN THE BHOPAL LITIGATION

“As a moth is drawn to the light so is a litigant drawn to the United States.” – (Lord Denning)

When the Bhopal action was being fought in the U.S. courts and UCC wanted the actions dismissed on the ground of “forum non-conveniens”; written briefs were filed.

Indian Government’s Stand

By a curious irony the Indian Government insisted that the United States courts must try the actions while UCC urged that the Indian courts alone provided an adequate and appropriate forum.

The Government of India had this to say—

“The institutional, procedural and practical limitation ingrained in the Indian legal system render the Indian courts incapable of providing a forum adequate for this litigation.”

“Due to procedural constraints and the pending backlog of cases, the adjudication in India of claims arising from the Bhopal disaster would inevitably lead to delay of such magnitude that the prosecution of such claims would effectively be frustrated.”

“Through its motion to dismiss on grounds of ‘forum non-conveniens’ Union Carbide seeks a complete perversion of a doctrine designed to

serve the ends of justice. Stripped to its essentials, the attempt by Union Carbide to escape justice in the courts of its own forum is nothing more than forum shopping."

"The Union of India by filing its complaint with this Court, made clear its position that justice for the Bhopal victims can only be secured in the United States. This extraordinary act of a foreign sovereign seeking justice in an American Court leaves no question as to the public interest of India. Union Carbide, however, presumes the incredulous position of arguing that it is in the best interest of the victims to litigate these cases in India."

UCC's Stand

As against this, the Union Carbide Corporation in its brief had this to say quoting a leading jurist and former Indian ambassador to the United States of America:

"The charge that the Indian judiciary is not innovative is baseless. To say that our Supreme Court is super-innovative would be closer to the truth."

"To say that the Bar in India is ill-equipped to deal with the Bhopal case is a slanderous reflection on the legal profession in India unredeemable by the plea of truth."

Probably the truth lies somewhere in-between. The Indian Government had to go to the United States courts because of the jurisdictional difficulty which it might have faced in Indian courts against a foreign corporation which had no presence in India except the holding of shares.

As against this the fabulous damages awarded by American juries is a great attraction to litigate in American courts from which the Indian Government may not have been immune.

Remarks of Justice Seth

This stand of the Union of India attracted public criticism and has been noticed by the High Court of Madhya Pradesh when dealing with the question of interim relief. Justice Seth observed:—

"With regard to the aforesaid fourth conclusion reached by Judge Keenan this court cannot restrain itself from expressing its shock over the manner in which with the sole object of getting over what appeared to be an incontrovertible plea of "forum non-conveniens" raised by defendant - UCC before the American Court, the Plaintiff - Union of India under-rated its own judiciary and made it a subject-matter of ridicule so publicly before a foreign court."

VI

ABSOLUTE LIABILITY – DETERRENT DAMAGES

"We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order."—(per Bhagwati, C.J. in the *Shriram* case.)

The Shriram Fertiliser Case

In the early hours of December, 3/4, 1985, a year after the Bhopal gas leak, Oleum gas leaked out of the Shriram Food and Fertiliser Complex in Delhi. The gas which leaked was sulphur trioxide (a little less potent than Tear gas). However, the gas went up and then vaporized into thick yellow fog and started coming down over many densely populated areas of New Delhi creating a tremendous scare.

A public interest lawyer, M.C. Mehta had already filed a petition in the Supreme Court for the closure and relocation of the Caustic Chlorine Plant in the Shriram Food and Fertiliser Complex – a plant producing chlorine as a by-product which is a highly toxic chemical.

The *Shriram* case *M.C. Mehta v. Union of India*, (1987) 1 SCC 395; (1986) 2 SCC 176 and (1986) 2 SCC 325, went through several hearings. After obtaining reports from expert committees, the court permitted the restarting of the Chlorine Plant on balancing the advantages and the risks. These hearings and orders were delivered over a period of time from December, 1985 to March, 1986.

In May, 1986, the Bhopal litigation was dismissed by Judge Keenan in the U.S. Court on the ground of “forum non-conveniens”. In September, 1986, the Central Government filed its suit against UCC in the Bhopal District Court. The plaint of the Central Government in the Bhopal Court put forward a theory of “Multinational Enterprise Liability.”

In the *Shriram* case, Chief Justice Bhagwati saw an opportunity of deciding some of the questions relating to hazardous industries and influencing the course of the Bhopal litigation.

The Bhopal litigation

In fact, in the interim order dated February 17, 1986 [(1986) 2 SCC 176] in the *Shriram Foods and Fertilizer Industries v. Union of India*, he specifically mentioned that seminal questions concerning the principles and norms for determining liability of large enterprises engaged in the manufacture and sale of hazardous products, the basis on which damages in case of such liability should be quantified and many questions have arisen following upon the gas leak at Bhopal.

The New Standard: *Rylands v. Fletcher* Discarded

The difficulty which faced the Bench in the *Shriram* case was a threshold one of its jurisdiction. The Supreme Court has original jurisdiction by way of writs only against the State. The Shriram Factory was owned by a public limited company called DCM Ltd., in the private sector and the private sector corporations are not regarded as the State. However, without finally deciding the question of jurisdiction the Court seized the opportunity of formulating principles of liability of hazardous industries in the following words: It held: [(1987) 1 SCC 395 (420)]—

“We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing

in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to any one on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standard of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part"

"We would therefore hold that where an enterprise is engaged in hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate *vis-a-vis* the tortious principle of strict liability under the rule in *Rylands v. Fletcher*."

The Deterrent Principle

Having thus formulated the principles of absolute liability in terms almost identical with the plaint of the Central government in the Bhopal Court, the judgment further went on to formulate a measure of damages, in the following words:

"We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of hazardous or inherently dangerous activity by the enterprise."

VII

CRITICISM OF THE NEW STANDARD OF LIABILITY

"An uncertain promise of law" Per - Mukharji CJ.

The new standard of liability enunciated in the *Shriram* case was sought to be justified in the judgment on several grounds: (1) That new principles of liability have to be evolved and new norms laid down to deal with new problems arising from sophisticated and hazardous industries; (2) Industry had to internalise costs arising from compensation payable in case of accidents as an appropriate item of its overheads; (3) The injured victim would neither have the resource nor the capacity to guard against the hazards and dangers resulting from such activity; (4) The rule in *Rylands v. Fletcher*, (1868) LR 3 HL 330, evolved in the 19th century could not meet the challenges of a developing economy in the 20th century and even recognised exceptions to strict liability, namely, acts of God, act of stranger, consent of the injured, natural use of land or statutory authority cannot afford a defence.

The above absolute standard is open to several lines of criticism.

The whole concept of damages in tort law is compensatory not punitive. Damages which are deterrent or exemplary can only be awarded in a few cases of gross negligence or other aggravating circumstances. If the liability was to be "no fault" and absolute without exception where was the question of deterrent punishment?

Could an industrial enterprise be held liable if the accident was caused by an act of a terrorist or by natural calamities like earthquakes and floods and that too on the basis of its assets?

Would the same principle not apply to Government corporations and public sector undertakings which are considerable in number in India and would the same standard and measure of damages be applied to them?

In *Charan Lal Sahu v. Union of India*, (1990) 1 SCC 613 (704): AIR 1990 SC 1480, which upheld the validity of the Bhopal Act, 4 out of 5 judges have expressed reservations on the deterrent standard of damages formulated in the *Shriram* case. It has been observed:

"It was urged that it is time in order to make damages deterrent, the damages must be computed on the basis of the capacity of a delinquent made liable to pay such damages and on the monetary capacity of the delinquent the quantum of the damages would vary and not on the basis of actual consequences suffered by the victims. This is an uncertain promise of law. On the basis of evidence available and on the basis of the principles so far established, it is difficult to foresee any reasonable possibility of acceptance of this yardstick. And even if it is accepted there are numerous difficulties of getting that view accepted internationally as a just basis in accordance with law."

The above observations seem considerably to weaken the absolute standard linked with deterrent damages as formulated in the *Shriram* Case.

VIII

INTERIM DAMAGES IN TORT ACTIONS

The Bhopal litigation presented the Indian judiciary with an unprecedented situation. Mass disaster actions on a large scale were unknown in India. The normal pattern of tort litigation was modelled on the common law system. Actions in trespass, nuisance, defamation and of course claims arising from motor accidents, railway accidents or other personal injuries was the main component of tort litigation. Absence of any system of 'contingency fees', large institution fees before filing a suit and absence of jury trials offered no incentives to tort actions culminating in large awards of damages.

After the suit was filed in the Bhopal District Court in September, 1986, the stage of discovery and inspection had not reached after one year.

Bhopal District Judge's View

On 2nd April, 1987, the District Judge made a proposal to the parties for what he termed as "reconciliatory substantial interim relief to the gas victims".

The Judge was disturbed by the slow pace of court proceedings and was moved by the plight of the gas victims. He said—

“Such an unprecedented situation has arisen now and I could not resist genuinely considering and spelling out a new mode of interim reconciliatory process for substantial interim relief to the gas victims”.

He invoked the inherent powers of the Court and said,

“What is the legal sanction for such step. The answer, though simple is sound. This Court is a Court of Justice ... If a court of justice could not draw upon inherent powers when faced with such unprecedented misery it would be sheer mockery of the potent provision of inherent powers”.

Ultimately in December, 1987, the District Judge after listening to arguments but without trial, and without any evidence being recorded ordered UCC to deposit a sum of Rs. 3500 million (about US \$ 250 million) for payment of “substantial interim compensation and welfare measures” for the gas victims.

Apart from invoking the Court’s inherent powers he held that he had jurisdiction to order interim relief on the available material even though the trial had not commenced and no evidence was led.

Madhya Pradesh High Court’s View

On appeal the High Court of Madhya Pradesh was concerned with the enforceability of the District Judge’s order in the American courts. UCC had no assets in India except its shareholding in UCIL. The High Court Judge negatived the theory of inherent powers but ordered payment of a reduced sum of Rs. 2500 million (about U.S. \$ 170 million). He relied on the standard of liability enunciated in the *Shriram* case. He ruled that the payment ordered—

“is not a payment of interim relief without reference to the merits of the case.....but is a payment of damages under the substantive law of tort on the basis of more than *prima facie* case having been made out”

He ordered—

“the liability of UCC to pay the above said payment by way of interim payment of damages shall be final and conclusive as such damages and in case of failure on its part to deposit the same it shall be open to the plaintiff Union of India to execute this order as if it were a decree passed in its favour by the trial court.”

The High Court judgment was carried by cross appeals by the parties, UCC and the Central government to the Supreme Court. An interesting question which was debated for many days was whether under the law of tort, the court could give damages by way of interim relief without evidence, without proof and without even the stage of discovery having been reached.

In view of the settlement arrived for a sum of US \$ 470 million in February, 1989, the matter was never decided by the Supreme Court.

However, in *Sahu’s* case two Judges observed in passing:—

“In the first place, it was, and perhaps still is, a moot question whether a plaintiff suing for damages in tort would be entitled to advance or interim payments in anticipation of a decree.”

Power to Award Interim Damages

The interesting issue and question which arises is whether interim damages can be awarded under other judicial systems without any express statutory support?

Should the industrial enterprises manufacturing products or dealing in hazardous substances be not subjected to a regime, of compulsory insurance?

As the law stands today in India, the Madhya Pradesh High Court judgment will have great persuasive value. By taking cover under the phrase "equity, justice and good conscience" – a phrase utilised by English judges before independence to apply the common law of tort to India with necessary adaptation to Indian conditions the High Court has innovated by a quantum jump.

Would this line of reasoning be acceptable in other jurisdictions? Particularly, in jurisdictions where tort actions are tried by juries?

IX

SUGGESTIONS FROM THE BENCH

While upholding the validity of the Bhopal Act in *Charan Lal Sahu v. Union of India*, (1990) 1 SCC 613: AIR 1990 SC 1480, some suggestions have been made in the judgments of the Supreme Court of India. The principal ones are: (1) The Government should examine as to what conditions be imposed while licensing or permitting hazardous industries to be run on Indian soil. (2) The Government should insist as a condition precedent the creation of a fund from which damages may be immediately paid in case of a disaster. (3) The basis for damages in case of leakages should be statutorily fixed taking into consideration the nature of damage inflicted and capacity of the parties to pay. Deterrent or punitive damages on a proper basis may be formulated and the Law Commission or other competent bodies may evolve a norm or standard. (4) Legislation providing for immediate compensation on a 'no fault' basis (5) Compulsory insurance against third party risks for hazardous industries. (6) The creation of a special forum speedily to grant interim relief in appropriate cases. (7) Examination of a proposal to create an Industrial Disaster Fund. (8) The necessity to evolve, either by international consensus or by unilateral legislation steps to ensure - (a) that foreign corporations seeking to establish an industry in India agree to submit to the jurisdiction of the courts in India in respect of actions for tortious acts in the country; (b) that the liability of such foreign corporation is not limited to such of its assets (or the assets of its affiliates) as may be found in this country but that the victims are able to reach out to the assets of such concerns anywhere in the world; (c) That any decree obtained in Indian courts in compliance with due process of law is capable of being executed against such a foreign corporation, its affiliates and their assets without further procedural hurdles in those countries; (d) The right to information of the nature of the processes, the risks in case of accidents and the existing safety procedures.

X

CONCLUSION

As an industrial power India is slowly taking off. Her ambition is to export and supply sophisticated products and technologies abroad. She is no longer a mere exporter of raw material and semi-finished goods but is anxious to export sophisticated products like electronic appliances, motor cars, setting up of hydro-electric projects, drilling of oil wells, etc.

Indian Enterprise Abroad

In other words, over a period of time, Indian corporations either in the private sector or the Government sector would have operations and products in foreign markets. In the event of an accident or injuries caused by such operations outside India would not a similar standard of liability be applicable to Indian enterprise. If so, would such standards applied against the Indian enterprise be well received, by Indians?

By a similar process of reasoning foreign industry and technology would be reluctant to operate in India if such stringent standards of liability and deterrence are visited upon hazardous technologies. These are questions which are not immediately apparent to popular sentiments carried away by the Bhopal tragedy but a Government has to take a long-term view and balance advantages and disadvantages of a particular course of action.

State of Enterprise in India

And what about the liability of State-owned hazardous industry? Would the same standard of absolute liability linked with deterrence apply to them?

Balancing Hazardous technologies, developmental needs and environmental protection

Even an interim order in the *Shriram Foods and Fertilizer Industries v. Union of India*, (1986) 2 SCC 176 (201), emphasises that a balance has to be struck. To quote—

“.....It is also necessary to point that when science and technology are increasingly employed in producing goods and services calculated to improve the quality of life, there is a certain element of hazard or risk inherent in the very use of science and technology and it is not possible to totally eliminate such hazard or risk altogether. We cannot possibly adopt a policy of not having any chemical or other hazardous industries merely because they pose hazard or risk to the community. If such a policy were adopted, it would mean the end of all progress and development. Such industries, even if hazardous, have to be set up since they are essential for economic development and advancement of the well-being of the people.”

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Compensation and Damages and Hazardous Technologies

This paper was prepared for the Indo-British Forum, New Delhi held from 29 December 1990 – 1 January 1991. It addresses the issue of the measure of damages for personal injuries caused by hazardous technology, referring to the Bhopal Gas Leak Case and the Shriram Fertilizers case. It also discusses an American perspective as to whether large awards of damages are an effective regulator of hazardous technology or whether such damages stifle research and innovation particularly in the vaccine-producing industry in the USA.

Introduction

The focus in this brief presentation is on a very narrow issue. The nature of tort liability and the measure of damages for personal injuries caused by hazardous technologies – a topic where Indian judge-made law has covered innovative and controversial ground.

But before I do so, a general overview of the concept and principles of damages and compensation under the Indian legal system would give a better insight to our British friends.

*The British Connection**

The East India Company obtained its Charters from Elizabeth I and James I in the years 1600 and 1603. These Charters granted to the Company—

“the power to them to make, ordain and constitute such and so many reasonable laws, constitutions, orders and ordinances as to them shall seem necessary so always that the laws orders constitutions, ordinances be reasonable and not contrary or repugnant to the laws, statutes customs of this our realm.”

Charles II's Charter gave to the Government and Council of Several places belonging to the Company the power “to judge all persons belonging to the said Government and company or that should live under them in all causes

* Based on M.C. Setalvad: *The Common Law in India*: Hamlyn Lecture.

whether civil or criminal according to the laws of this Kingdom and to execute judgment accordingly”.

This was the genesis of the application of English law to the Indian sub-continent through the conduit of the East India Company's possessions. The Company's factories at Surat and other places were under the loose dominion of the Moghuls. The ambassador of James I to the Moghul Court (Sir Thomas Roe) secured by treaty the privilege of deciding disputes between the English in their factory at Surat.

Meanwhile, the island of Bombay was gifted by the Portuguese to the English Crown as dowry and was leased by Charles II to the East India Company in 1668 at an annual quit-rent of £ 10 per annum. The island was, Portuguese territory and was never under the Moghuls. The Charter of Charles II required the Company to enact laws (for the island of Bombay) “consonant to reason, and not repugnant or contrary to” and “as near as may be agreeable” to English laws. The Charter provided that the courts and their procedures should be “like unto those that are established and used in this our realm of England”.

In 1672, Governor Aungier established an English Court in Bombay and issued a proclamation “for abolishing the Portugal laws and for establishing the English”. Aungier's speech is worth a mention. He said:

“The inhabitants of this Island consist of severall nations and religions to wit – English, Portuguese and other Christians, Moores and Jentues, but you, when you sit in this seat of Justice and Judgement, must looke upon them with one single eye as I doe, without distinction of Nation or Religion, for they are all his Majesties and the Hon'ble Company's subjects as the English are, and have all an equall title and right to Justice and you must doe them all Justice even the meanest person of the Island and in particular the Poore, the Orphan, the widdow and the stranger, in al matters controversy, of common right, and Meum and Tuum; And this not only one against the other, but even against myself and those who are in office under, me nay against the Hon'ble Company themselves when Law, Reason and Equity shal require you soe to doe, for this is your Duty and therein will you be justified, and in soe doing God will be with you to strengthen you, his Majestie and the Company will commend you and reward you and I, in may place shall be ready to assist, countenance, honour and protect you to the utmost of the power and Authority entrusted to me, and soe I pray God give his blessing to you”.

But prior to this it was not always the English law which was administered in the Company's possessions.

A wizzard was tried and was “found guilty both of witchcraft and Murder”. A contemporaneous report in correspondence records the trial and punishment:

“to the last wee intended to have hanged him; only it was generally advised that burning would be farr the greater terrour, as also that a single wizzard deserving hanging, whereas he had now murthered 5 men in 6 months and had bin twice banished before for a wizzard, soe we burnt him”;

Thus were laid the foundations of the application of the English Common Law to India. The Mayor's Courts in the Presidency Towns of Calcutta, Madras and Bombay were, enjoined to administer law according to "justice and right" and later the successor courts under their Letters Patent issued by the British Crown were to administer justice "according to justice, equity and good conscience". British judges sitting in Indian courts injected a large measure of the English Common and statute Law as interpreted in English decisions as part of "justice equity and good conscience". In many cases which went to the Privy Council, on appeal, the principles of the English law *e.g.*, mortgage, escheat, were applied in preference to the local personal laws. The Privy Council authoritatively opined that "justice equity and good conscience" meant "the rules of English law if found applicable to Indian Society and circumstances".

The Law of Contracts: Compensation and Damages

The Indian Contract Act of 1872 defined and amended certain parts of the law of contracts including chapters on the Sale of Goods and Partnership (which have now been enacted into separate statutes). The Act is not a consolidating statute and therefore not a complete Code. The English Common Law and its principles have always been relied upon in the absence of statutory provision to the contrary.

The principles and measure of damages are crystallised in sections 73 and 74. The Common Law principle of compensating the loss or damage which arose in the usual course of things as a result of breach of contractual obligations is codified. Loss or damage which is remote or indirect is not to be compensated. Mitigating losses is statutorily obligated. Under section 74 actual proved damage or loss alone is to be awarded even though liquidated damages or penalty have been specified in the contract. The Common Law principles and the English judicial refinements on penalty and liquidated damages are negated by a clear statutory mandate. As a result, the plaintiff cannot get more than the liquidated damages contractually specified, though there is a possibility of his getting less. Similarly a stipulation of an increased rate of interest may also be attacked as a penalty. If so, the claimant can only recover the actual damage sustained.

Background of Tort Litigation and Damages

Indian tort law is not codified. There are statutes covering narrow fields of tort law *e.g.* The *Fatal Accidents Act*, 1855; The *Motor Vehicles Act*, 1939; The *Workmens' Compensation Act*, 1923.

Under the Constitution of India all laws in force prior to its commencement are continued. As noticed above prior to independence, the Indian courts broadly administered the English Law of torts as modified by Indian statutes and adapted to suit Indian conditions.

Damages, awards by Indian courts have always been on the modest side. There are several reasons why a tort action was not attractive to the litigant for obtaining large amounts of damages.

First, in Tort actions, India never had a jury system and large jury awards like some American jurisdictions were unknown in India. *Second*, the system of

contingency fees was regarded as illegal, *unethical* and amounting to champerty. Third, there are very stiff *ad valorem* institution fees to be paid before filing a suit. These run as high as 6% *ad valorem* on lower slabs and taper off to 1% or less on higher slabs.

Hazardous Technologies

Hazardous Chemical and other industries have been of recent origin in India — about twenty years. Petrochemicals, chemicals, pesticides are notable examples. Recently many medium scale industries which are of a hazardous nature have come to be housed adjacent to residential and populated areas. Industry attracts workers, housing and satellite commercial activity like shops, eating-houses stores etc. These concentrations dramatically increase risks in case of accidents. Faulty planning, disregard of planning and housing regulations and populist support for political expediency are the major reasons of mushrooming population centres near hazardous industries.

The Bhopal Gas Tragedy and Ensuing Litigation

The Bhopal litigation arose from the escape of MIC (Methyl Isocyanate) from the pesticide factory of Union Carbide India Ltd. (UCIL) subsidiary of Union Carbide Corporation USA (UCC). The Bhopal litigation was settled in February 1989 with the approval of the Supreme Court of India in the sum of US \$ 470 million between UCC and UCIL and the Government of India. The Government of India was litigating as '*parens patriae*' under exclusive statutory authority for all the victim claimants conferred by the Bhopal Gas Leak Disaster (Processing of Claims) Act (the Bhopal Act). This settlement however is under challenge before the Supreme Court on review at the instance of public interest groups and the final outcome of the litigation as yet remains unresolved.

The Shriram Fertiliser Case: The New Standard

On December 3-4 1985, exactly one year and one day after the Bhopal gas leak, Oleum gas (Sulphur Trioxide) escaped from a factory complex in New Delhi belonging to the Shriram Chemical & Fertiliser Division owned by a public limited company in the private sector *viz.*, D.C.M. Ltd. The gas went up and came down in thick yellow smoke in many parts of Delhi creating panic. The gas was not lethal being less toxic than 'tear gas' commonly used by riot police all over the world.

In *M.C. Mehta v. Union of India*, (1987) 1 SCC 395, (known as the *Shriram* case) the gas leak incident came up before the Supreme Court. It appears that the court being aware of the Bhopal litigation pronounced upon the tortious liability of hazardous industries and the measure of damages in such cases. It is best to extract the relevant portion of the judgment:

"We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of the hazardous or inherently dangerous nature of the activity which is

undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensation for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part."

"That where an enterprise is engaged in hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity, resulting for example in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate *vis-a-vis* the tortious principles of strict liability under the rule in *Rylands v. Fletcher*, (1868) LR 3 HL 330."

In sum, the new standard; was:

- Absolute (not strict) liability for hazardous enterprises;
- Negligence was not an essential ingredient to be proved by the plaintiff. The defendant industry cannot plead that it had taken all reasonable care and the harm was not foreseeable,
- None of the exceptions well-known in tort law as a defence to strict liability (*Rylands v. Fletcher*) would be available *e.g.*, act of God, acts of strangers, natural user of land, statutory authority or consent of the plaintiff.

The burden on the plaintiff would only be to establish injury as a result of the operation of the hazardous enterprise. This new standard was sought to be supported on three principal grounds - First, if the enterprise was permitted to carry on hazardous or inherently dangerous activity, the law must presume that such permission was conditional on the enterprise absorbing the cost of any accident as an appropriate item of its overheads. *Secondly*, that the enterprise alone has the resources to discover and guard against such hazards and dangers. Thirdly, new principles have to be evolved and new norms laid down adequately to deal with new problems. The rule in *Rylands v. Fletcher*, evolved in the 19th Century was ill-suited to meet the challenges of a developing economy in the 20th Century.

The result of the *Shriram* judgment was to formulate a no-fault or absolute liability standard (equal to that of an insurer) excluding well recognised exceptions to strict liability. The liability can, therefore, be termed as "absolutely absolute".

The Deterrent Principle: Punitive Measure

The *Shriram* judgment went on further to lay down a far-reaching principle on the measure of damages. It observed:

"We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be co-

related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying out of the hazardous or inherently dangerous activity by the enterprise."

Criticism and Infirmities

On reflection the above formulation is open to several infirmities and lines of criticism. Could hazardous industries be saddled with absolute liability without any exceptions? What about acts of terrorism (which have gained considerable support in several parts of the country)? Will they not furnish a defence? If an oil installation is attacked by terrorists or subversive elements would the enterprise still be liable absolutely? Can natural calamities like earthquakes or floods or other vis majors be wholly ignored? The imposition of an absolute no-fault liability (equivalent to that of an insurer) has been coupled with a punitive measure of compensation related to the assets of the enterprise. In other words the same injury caused by a smaller corporation would invite damages of rupees hundred thousand but if the assets of the defendants are ten times more the compensation would be rupees one million.

If world assets of the enterprise are to be taken into account would the same standard of liability be applied to Indian corporations working abroad? Indian industry has a lot of expertise in the building of dams and hydro-electric projects and is increasingly going global. Many of these Corporation are government owned. Would Indian courts accept a similar absolute standard of liability based on the assets of an Indian Corporation if a foreign court were to pass an award of compensation or damages in accordance with the *Shriram* principle? Lastly, even in India there are many hazardous enterprises carried on by corporations whose shareholdings are entirely owned and controlled by government. Recently there was an accident in a large gas cracker plant in Maharashtra owned by a Central Government Corporation. A number of deaths occurred. If the *Shriram* principle is to be applied there is no reason why a very high award of damages on the punitive measure cannot be made against the Government Corporation?

Subsequent Comments and Judicial Second Thoughts

In the ongoing Bhopal litigation, the constitutional validity of the Bhopal Act was challenged as being violative of the fundamental rights of the gas victims. This was the principal issue but some doubts have been cast on the deterrent principle mentioned in the *Shriram* case in observations made in that judgment. Two Judges (Mukharji CJ and Saikia J) (1990) 1 SCC 613 (704), after broadly discussing what was held in the *Shriram* case observed:

"On behalf of the victims, it was suggested that the basis of damages in view of the observations made by this Court in *M.C. Mehta's* case (The *Shriram* case) against the victims of UCC or UCIL would be much more than normal damages, suffered in similar cases against any other company or party which is financially not so solvent or capable. It was urged that it is time in order to make damages deterrent, the damages must be computed on the basis of the capacity of a delinquent made liable

to pay such damages and on the monetary capacity of the delinquent the quantum of the damages awarded would vary and not on the basis of actual consequences suffered by the victims. This is an uncertain promise of law. On the basis of evidence available and on the basis of the principles so far established, it is difficult to foresee any reasonable possibility of acceptance of this yardstick. And even if it is accepted, there are numerous difficulties of getting that view accepted internationally as a just basis in accordance with law. These, however, are within the realm of possibility."

Two other Judges also referring to the punitive liability element in the *Shriram* case observed:

"Mukharji CJ has pointed out....and we are inclined to agree ...that this is an "uncertain province of the law" and it is premature to say whether this yardstick has been or will be accepted in this country, not to speak of its international acceptance, which may be necessary should occasion arise for executing a decree based on such a yardstick in another country."

The above observations are judicial second thoughts and considerably weaken the punitive or deterrent principle of measuring damages co-related to the assets of the defendant as formulated in the *Shriram* case.

An American Perspective

Could large award of damages be an effective and efficient regulator of hazardous technologies through the adversarial litigative process?

Peter Huber presents some interesting insights in his celebrated article (85 Columbia Law Review 277: March 1985).

Huber categorises "public" risks as threats to human health or safety that are centrally or mass produced and are largely outside the individual risk-bearer's direct understanding and control. 'Public' risks usually derive from complex technology - large scale electric power plants, transport in jumbo jets, mass produced vaccines, chemical industries etc. He contrasts them with "private" risks *e.g.*, small risks from cottage industries, transportation by car, etc.

He argues that 'public' risks are progressive.... they improve the overall state of our risk environment. His thesis goes on to argue that the judicial system for a variety of reasons is an inefficient regulator and is "incapable of engaging in the aggregative calculus of risk-created and risk-averted that progressive 'public' risk management requires".

Huber's in-depth study of the vaccine producing industry in USA offers: stimulating insights.

A small-pox vaccine programme in spite of the hazards of contacting 'small pox' from the vaccine itself was upheld in the early years by the Supreme Court of USA. The vaccine eradicated the disease not only in USA but in many parts of the world – a great public health benefit to the community.

But in future other vaccines met a different fate. With the development of the strict products liability doctrine, Wyeth Laboratories lost an action when an oral polio vaccine paralysed one Glenn Richard Davis, even though the

vaccine enjoyed full regulatory approval. Lawsuits against vaccine producers multiplied.

Huber cites the example of the Swine Flu National Vaccination Program which gave rise to claims totalling to almost US Dollars 3 billion. Insurance Companies were unwilling to insure and ultimately the vaccine producers refused to produce or sell the vaccine. The U.S. Congress had to intervene and provide an exclusive remedy against U.S. Government for personal injury from the vaccine – in effect an indemnity to the producer. And this, even though the vaccine was safer than many others and was actively recommended by the regulatory agencies.

An equally telling instance given by Huber is the case of the Whooping Cough Vaccine. Though of great benefit to the young in the community, one in every 3,10,000 recipients experiences serious brain damage. Wyeth Laboratories opted out of the vaccine producing market because of tort liability. Similar withdrawals of other manufacturers forced the Federal Government to resort to stockpiling.

Huber comments that an industry which has researched innovated and knocked out so many grave diseases finds itself financially beleaguered. He infers that the legal system has regulated “not wisely but too well”. Huber observes on the role of the lawyer—

“The greatest vanity of the legal profession — a profession with more than a few vanities is its conviction that there are no limits to the contributions lawyers can make to the public safety. The natural self-aggrandising instinct of altogether too many lawyers and judges is to stand up and do something — anything at all...when any aspect of life seems less than perfect. But the reality is that life has grown safer not because of the legal system but despite it.”

He concludes:

“Public Law adjudication in Courts—Simply does not and cannot yield progressive choices among ‘public risks’. The public law model of judicial action is a grand design for having lawyers decide everything everywhere. But in risk matters, at least, experience and common sense teach that the only beneficiaries are likely to be lawyers themselves.”

Conclusion

The problem and risks faced by the community from hazardous industry has stimulated a swift judicial response in the *Shriram* case. The linking of an absolute no-fault liability with the deterrent principle is a stranger to the traditional concept of compensation. The idea of giving the injured a monetary equivalent to what he has lost is the central concept of compensation and damages. Apart from punitive damages arising from contumacious and grossly culpable conduct, punishment belongs to the ambit of criminal law.

Suggestions have been made from the Supreme Court Bench, *Charan Lal Sahu v. Union of India*, (1990) 1 SCC 613, to the Legislature and Executive about exploring several possibilities. The principal ones are – (1) Setting up of a

statutory "Industrial Disaster Fund"; (2) regulating on what terms Transnational Corporations function in host countries and their agreement to submit to the host country's courts jurisdiction; (3) special procedures and courts to quickly adjudicate mass torts; (4) provisions for interim relief pending litigation; (5) providing for fixing of minimum compensation on a "no-fault liability" basis; (6) a compulsory insurance regime for hazardous industry.

But some of the pitfalls of an unrealistic and over-strict approach are self-evident.

India is slowly taking off as an industrial power, Indian Corporations abroad, many of them government owned, must be prepared to face and live with the same concept of absolute liability and deterrent damages unrelated to fault which they expect a foreign corporation to face in India. Large Public Sector Corporations are operating in India, in the hazardous field, will they not encounter similar problems in case of an accident? Are their assets and those of its owner, the Central Government to be reckoned in applying the deterrent principle? Or are some legislative maximum limits necessary as in the case of air accidents?

Balancing the needs of development against the risks of hazardous but beneficial technologies is a delicate problem and a proper mix between damage awards and the growth of industry can no longer be delayed.

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Limitation of Liability – Bhopal & Beyond

This speech was made at the Legal and Tax Summit at New Delhi from 9-10 April 2010. It deals with the liability provisions in the Civil Liability for Nuclear Damage Bill (CLND Bill 2010), the Paris Convention of 1960 regarding third party liability for nuclear damage as well as the Vienna Convention of 1963 and US cases in that connection.

I must thank the organizers of this Conference called the Legal and Tax Summit, 2010 organized by the Independent Power Producers Association of India (IPPAI) and SILF for extending me the honor of chairing this very interesting session.

The subject of this Session is “Limitation of Liability: Bhopal & Beyond”.

The Civil Liability for Nuclear Damage Bill (CLND) Bill, 2010 has not been introduced in Parliament but various versions are floating around on the Internet. I have seen one such version.

I propose to highlight some issues which I am sure will be dealt with by the Speakers.

The Tort Law – Common Law and the Indian Law

I was involved as counsel in both cases – The *Bhopal* Case and the *Shriram* Case.

I argued for the Enterprise - The Shriram Fertilizer Company in the *Oleum Gas Leak* Case. In the Bhopal Case, I was appearing for the American Corporation – Union Carbide Inc.

Broadly, the Common Law of Torts furnishes a cause of action to a person who suffers damage to person or property from the negligence or breach of duty of another. In other words the negligence or breach of duty has to be established.

In *Rylands v. Fletcher*, (1868) LR 3 HL 330 the rule of strict liability was formulated in England. This rule makes the owner of the land liable to damages caused by escape of anything which the owner brings or collects on his own land. This rule was applied to what was characterized as “non natural use” of land and did not apply to things naturally on the land. However this rule would

not be applicable if the escape was due to Act of God, the act of a stranger, or default or consent of the person injured or in cases where the activity was authorized under statute. In other words earthquakes, lightning-strike, terrorists strike, etc., would exonerate the owner.

In India in the *Shriram Foods and Fertilizer Industries and another, Petitioners v. Union of India*, (1987) 1 SCC 395 a new doctrine was established. The principle of liability was enunciated as a no fault liability.

The *Shriram Fertilizer Case* which has laid down the governing standard in Indian law has been characterized by me in my Article "The Supreme Court and Tort Litigation" as the Principle of "Absolutely Absolute Liability" (This Article was published in a book called "Supreme But Not Infallible" by Oxford (2000) as part of the golden jubilee celebrations of the Supreme Court and under its aegis. The principle laid down a no fault liability and attaches even though the event has occurred due to an act of God (earthquake) or war or terrorism. It is without exception. It applies to enterprises working for "private profit". Lastly the quantum of damage was correlated to the magnitude and capacity of the enterprise so that compensation has a "deterrent" effect. In my article I said "to put it pithily, the liability was neither strict nor absolute, but absolutely absolute".

The manner in which the principle was formulated excluded public sector undertakings. Even the quantum of damages was linked to the assets of the private enterprise *i.e.*, greater and larger the assets greater and larger the damages - obviously punitive damages.

Even though there were observations doubting the correctness of this principle, in a later judgment of the Supreme Court in *Indian Council for Environmental Action v. Union of India*, (1996) 3 SCC 212 the principle was reaffirmed.

International Standards

The Civil Liability for Nuclear Damage Bill (CLND Bill), 2010 (version available) has created a lot of controversy and spawned major issues. Before I highlight some of the important issues it would be interesting to see the international standards and the US standards in this connection.

The Paris Convention of 1960 (as amended by the Protocol of 2004) and the Vienna Convention 1963 (as amended by the Protocol of 1997) laid down several norms. Broadly they are:

1. Liability is channelled to the nuclear installation operator (Operator)
2. All other persons are freed from liability (Suppliers or other third persons)
3. The total liability is limited with a cap (limit) a portion of which is to be borne by the operator and the balance by Public Funds.
4. The limits are flexible to be adopted by each state but there is a minimum laid down.

Third party Liability

Under the Paris Convention, 1960 as well as the Vienna Convention there is immunity given to third party from liability except transport, etc.

Paris Convention: Article 6

“Except as otherwise provided in this Convention, no person other than the operator shall be liable for nuclear damage. This, however, shall not affect the application of any international convention in the field of transport in force or open for signature, ratification or accession at the date on which this Convention is opened for signature.”

Vienna Convention, 1963, Article II clause 5

“a. The right to compensation for damage caused by a nuclear incident may be exercised only against an operator liable for the damage in accordance with this Convention, or, if a direct right of action against the insurer or other financial guarantor furnishing the security required pursuant to Article 10 is given by national law, against the insurer or other financial guarantor.

b. Except as otherwise provided in this Article, no other person shall be liable for damage caused by a nuclear incident, but this provision shall not affect the application of any international agreement in the field of transport in force or open for signature, ratification or accession at the date of this Convention.”

The CLND Bill is not clear about third party liability and does not contain any provision like the Paris or Vienna Convention. It may be noted that the Bill provides for Claims Commission for the purpose of adjudicating upon claims for compensation in respect of nuclear damage. This Commission would adjudicate only those claims which arise under the Act and against the Operator and no one else. Further, in respect of the claim arising under the Act only the claim Commission has the jurisdiction and the jurisdiction of Civil Court in this respect is ousted by Section 35 of the Bill.

Since the Bill is not clear about third party liability, it could be argued that a tortious claim based on negligence, breach of duty, etc., against a third party may be maintainable.

The US Standard

The US Standard was crystallized in what is known as the Price-Anderson Act of 1957 – a no fault liability. However, it applies to “extraordinary nuclear occurrences”. This statute with amendments has been extended from time-to-time. There are three leading judgments namely:

- (1) *Duke Power Company*, 57 L ed 2d 595
- (2) *Pacific Gas and Electric Company*, 75 L ed 2d 752
- (3) *Silkwood*, 78 L ed 2d 443

In *Duke Power Company* the Price – Anderson Act which imposed a No-Fault Liability with a limit was held to be constitutional by the US Supreme Court. The principal grounds on which it was upheld are interesting.

It was held that:

- (a) The purpose of the Act was to protect the public by a No Fault Liability as well as to encourage and develop nuclear energy through private enterprise which was for the benefit of the public.
- (b) A statutory limit on liability was necessary to encourage private industries to participate.

- (c) Congress had evinced an intent to safeguard the victim if damages were more than the limit by providing "to take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster".
- (d) The argument that it would encourage irresponsible behavior by the enterprise/industry in matters of safety and environmental protection was rejected because of the "rigor and the integrity" of the process involved in licensing the nuclear power plant and also because the largest sufferer would be the nuclear utility enterprise. These were safeguards against irresponsible behaviour.
- (e) The Act provides for a "reasonable substitute" because under the Common Law the process of recovery by ordinary actions would be time consuming, uncertain, difficult for individuals to pursue. The Court observed:

"The present assurance of prompt and equitable compensation under a pre-structured and nationally applicable protective system would give way to uncertainties, variations and potentially lengthy delays in recovery. *It should be emphasized, moreover, that it is collecting a judgment, not filing lawsuit, that counts.*" (Duke Power Company, 57 L Edn. 2d 595, 621)

In another judgment (*Silkwood*, 78 L ed 2d 443) (a case of contamination of an employee) however it was held that the State Law providing punitive damages arising out of escape of plutonium from a nuclear facility was not preempted by federal law and such an action was maintainable.

It appears that in the USA, State laws providing for compensatory damages are available to victims.

The Bill

The provisions of the CLND Bill raise the following interesting issues on which an intensive debate in academia, on public platforms and ultimately in Parliament is essential. Some of these issues are:

1. Are the limitation of liability provisions in the Bill unconstitutional?
 2. Would the Bill preempt civil action of torts for damages against third parties *e.g.*, Suppliers etc.?
 3. Is the period of limitation of 10 years which extinguishes liability reasonable or should it be more in line with international standards *e.g.*, 30 years particularly for loss of life and personal injury.
 4. As all the nuclear facilities presently operating in India are State owned (controlled) would the principle of Absolute Liability formulated by our Supreme Court at all apply to them? These enterprises are not for "PRIVATE PROFIT".
 5. What are the other refinements and provisions which should be added to the draft Bill.
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Personalities

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Nani Palkhivala – Some Personal Glimpses – The Fundamental Rights Case

This article was published in the book “Nani Palkhivala – A Role Model” selected and edited by Maj. Gen. Nilendra Kumar and published by Universal Law Publishing Co. Pvt. Ltd. It deals with the author’s interaction with Palkhivala in the Fundamental Rights case as well as Dr. Dieter Conrad’s contribution to the theory of implied limitations and basic structure. The sequel of the supersession of judges and the attempt to reconsider the Kesavananda Bharati case are described.

Early Years

It is June 1949. The first LL.B Class on ‘Jurisprudence’ is about to start in the Government Law College Bombay. A very young man with a dense crop of curly jet black hair breezes into the classroom. The Professor is very nervous facing his first lecture to a new class of restless students. Next to me in the second last row is my lifelong friend and co-student Murlidhar Bhandare.

But for his double breasted coat and tie the lecturer could well have been mistaken for a student. He slowly warms up as the lecture proceeds – lucid, epigrammatic and pithy sentences laced with caustic humour. Gradually he captivates his class and perceptibly achieves dominance over the minds of his audience. By the end of his lecture Palkhivala has captured the hearts of a host of student admirers. This was my first exposure to Nani’s verbal charms.

Later in the early fifties in Bombay as young briefless lawyers we used to follow cases from court to court. On countless occasions I have observed this theme played in the first LL.B Class repeated over and over again. A quiet beginning slowly turning into a persuasive argument, maturing into the inexorable logic of legal reasoning and finally a spell-binding climax where the advocate obtains complete mastery over the judge and the listener. Palkhivala, like all great advocates could achieve this result in the briefest span of time with unfailing courtesy irrefutable logic and incomparable lucidity. His argument was

gentle and courteous but had an overwhelming effect. This probably gave rise to the oft-repeated story that many judges would not decide the case till they reflected for a few days after the conclusion of Palkhivala's argument.

After joining the chambers of M.L. Maneksha (one of the finest lawyers and advocates of his time) in the Bombay High Court, I had the opportunity of observing Palkhivala in daily conferences with Maneksha for about three weeks in the Prize Competitions case (*R.M.D Chamarbaghwal v. State of Bombay*). Maneksha was briefed to conduct the case and Palkhivala's great energy, industry, clarity of thought and his ability and dedication to the case as his junior made Maneksha predict a glorious future for young Nani.

The publication of the first edition of his famous tome soon catapulted Nani Palkhivala as the first choice of many clients in income tax matters and soon he dominated the Income Tax Reference Court presided over by Chief Justice Chagla.

The Fundamental Rights Case

I appeared with Palkhivala in some cases but the case I recollect most was the Fundamental Rights case (*Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461). I was briefed by the sugar factories of Maharashtra with Sandip Thakor as my junior supported by two eminent solicitors M.L Bhakta and D.M Popat. We were working on the case for several days in Bombay. Till about ten days before the case was to start Palkhivala was undecided whether he would accept the brief and M.C. Chagla was to lead the arguments for the petitioners. Chagla was however very keen that Palkhivala would be the best choice and ultimately Palkhivala was persuaded to argue the case. I vividly recall the first meetings with Nani, in Delhi when he arrived from Bombay a couple of days before the hearings commenced. Nani asked us to give all the cases where constitutional amendments were invalidated. We were flummoxed and told him that there was no such reported case of invalidation of a constitutional amendment. Palkhivala was greatly disheartened until we gave him an article by the late Prof. Dieter Conrad, Head of the Law Department of the South Asia Institute of the University of Heidelberg.

Dr. Conrad had propounded the theory of implied limitation of the amending power based on the German experience. The Nazi party undermined the Republic and the Weimar Constitution, when Adolf Hitler seized absolute dictatorial powers through the amendment process of the German Constitution.

A.G Noorani in 'Public Law in India' describes how M.K. Nambyar urged the argument of implied limitations in the Golaknath Case on the amending power inspired by Prof. Conrad's lecture in the Banaras Hindu University.

Noorani recounts that:

Dr. Conrad posed these questions:

"Could a constitutional amendment abolish Article 21, to the effect that forthwith a person could be deprived of his right or personal liberty without authorisation by law? . . . Could the amending powers be used to abolish the constitution and reintroduce, let us say, the rule of Mughal Emperors or of the

Crown of England? I do not want, by posing such questions, to provoke easy answers but I should like to acquaint you with the discussion which took place on such questions among constitutional lawyers in Germany in the Weimar period – a discussion seeming academic at first but suddenly illustrated by history in a drastic and terrible manner”.

In the Golaknath case the argument of implied limitations on the amending power is reflected in several judgments and Chief Justice Subba Rao has observed:

“The next argument is based upon the expression “amendment” in Article 368 of the constitution and it is contended that the said expression has a positive and a negative content and that in exercise of the power of amendment, Parliament cannot destroy the structure of the Constitution, but it can only modify the provisions thereof within the framework of the original instrument for its better effectuation. If the fundamentals would be amenable to the ordinary process of amendment with a special majority, the argument proceeds, the institutions of the President can be abolished, the Parliamentary executive can be removed, the fundamental rights can be abrogated, the concept of federalism can be obliterated and in short the sovereign democratic republic can be converted into a totalitarian system of Government. There is considerable force in this argument. . . . Learned and lengthy arguments are advanced to sustain it or to reject it. But we are relieved of the necessity to express our opinion on this all important question as, so far as the fundamental rights are concerned, the question raised can be answered on a narrower basis. This question may arise for consideration only if Parliament seeks to destroy the structure of the constitution embodied in the provisions other than in Part III of the Constitution. . . . We do not, therefore propose to express our opinion in that regard”.

In fact, M.K. Nambyar wrote on October 20, 1966 seeking Dr. Conrad’s permission to use the manuscript of his lecture as a part of his argument before the Supreme Court. Dr. Conrad readily and enthusiastically agreed on October 27, 1966 but stipulated that the whole manuscript may be presented to the Court.¹

It is clear that the theme propounded by Dr. Conrad was vigorously argued in the Golaknath case. Chief Justice Sikri and Justice Shelat were on the Bench in the Golaknath Case and in Kesavananda case, it was Sikri who raised questions in relation to inherent and implied limitations and guided the argument to that central point. The seed that was planted by Dr. Conrad, adopted in the arguments in the Golaknath case, was brought to flower and fruition by the impassioned advocacy and forensic brilliance of Palkhivala in the Fundamental Rights Case. The court by a narrow majority of 7 to 6 for the first time in any constitutional adjudication in the world propounded the doctrine of the basic structure of a Constitution being inviolable. Challenges on the ground of express limitations “in the manner and form” required for passing constitutional amendments

1. I am indebted to Mr. A.G Noorani for sharing this invaluable correspondence with me.

(eg. absence of a 2/3rd or prescribed majority or absence of ratification by the States) could be found in the law reports, but a constitutional amendment being struck down on the ground of violation of the basic structure was unknown to comparative constitutional law. It was a first in constitutional adjudication. Our Supreme Court rose to the occasion and built defences against the tyranny of the majority by fashioning a bulwark against the subversion of the basic structure of the constitution. This was probably Palkhivala's finest hour.

The Sequel

The sequel to this judgment also galvanized Palkhivala to organize significant countrywide protests. The judgment in the Fundamental Rights case was delivered on 24th April 1973, Chief Justice Sikri retired on 25th April 1973 and the Government superseded three seniormost judges of the Supreme Court Justices Shelat, Hegde and Grover by appointing Justice A.N. Ray as Chief Justice of India, the fourth senior-most judge. The three superseded judges who had decided against the Government promptly resigned. Justice A.N. Ray decided not only the Fundamental Rights Case in favour of the Government but had also delivered dissenting judgments in the Privy Purse and the Bank Nationalization cases upholding Government's contentions.

The whole legal fraternity was distressed. Chagla and Tarkunde who were then practicing in the Supreme Court persuaded members of the Bar for the first time in the history of the Supreme Court to abstain from work for a day on the supersession. Palkhivala was busy organizing protests and asked me to contact my uncle M.C. Setalvad (the first Attorney General for India) as to whether he would join in issuing a statement condemning the Government decision. A statement was released condemning the supersession drafted by Nani and among others signed by M.C. Setalvad (former Attorney General), M.C. Chagla (former Chief Justice Bombay), K.T. Desai (former Chief Justice Gujarat) and V.M. Tarkunde (former Judge, Bombay).

Later a meeting was held in May 1973 condemning the supersession where Setalvad, Daphtary (both former Attorney Generals), M. Hidayatullah, J.C Shah (both former Chief Justices of India), Iyengar (former Governor of the Reserve Bank of India) and Palkhivala participated. It was a largely attended meeting on the lawns of the Cricket Club of India, Mumbai and received wide publicity.

Justice Jagan Mohan Reddy's View

An insider's view as to how the supersession was arranged is now available in the autobiography of one of the members of the Bench (Justice Jagan Mohan Reddy) who was part of the majority. He records that there were clear indications that the Government while awaiting the decision knew what the decision was before the judgement was delivered and had made up its mind to supersede the three judges and appoint A.N. Ray as Chief Justice of India. He records that at a dinner party Mohan Kumaramangalam shook hands with A.N. Ray and said "congratulations next week" and Ray's response was a smile. He also mentions that a dinner was arranged at the Ashoka Hotel by former Chief Justice Hidayatullah and Ray was to attend it on 26th April. After the supersession Hidayatullah cancelled the dinner saying "I do not want my

superseded colleagues whom I respect, to think I was hosting a dinner to Ray on his appointment as a Chief Justice”.

Reconsideration of the Kesavananda Bharati Case

On June 12, 1975 Justice J.M.L. Sinha of Allahabad High Court decided the election petition filed against Indira Gandhi and disqualified her. In the evening of the same day the Janata Morcha was voted into power in Gujarat. On June 24, 1975 Justice Krishna Iyer granted Indira Gandhi a conditional stay². She could neither vote nor speak in the Lok Sabha. On 25 June 1975 a second Proclamation of Emergency was issued on the ground of internal disturbance. Large number of Opposition Leaders including Jayaprakash Narayan, Morarji Desai, Atal Bihari Vajpayee and L.K. Advani were arrested in a mid-night swoop. The Press was attempted to be muzzled and other draconian measures followed. In November 1975, at the instance of Chief Justice Ray a full Court of 13 judges assembled to reconsider the historic judgment in Kesavananda Bharati (Fundamental Rights Case). Palkhivala came down from Bombay to present the Citizen’s Viewpoint and to argue that the case should not be reconsidered.

Justice H.R. Khanna who was a member of the Bench in his autobiography refers to this unsuccessful attempt. He says, “I was also at a loss to understand as to how the matter had been referred to a bench of thirteen judges to reconsider the correctness of Kesavananda’s case as there was no order of any bench asking for reference of the matter to larger bench. . . . The Chief Justice thereupon remarked that request for reconsidering the correctness of the decision in Kesavananda’s case and for constituting a larger bench had been made by a number of counsel for states including Mr. Govind Swaminadhan, Advocate-General for Tamil Nadu. Immediately thereupon Govind Swaminadhan got up and said that he had not made such a request. . .” Justice Khanna continues “The main argument to oppose reconsideration was advanced by Nani Palkhivala. In one of the most impassioned addresses he said that no case had been made for reconsideration of the matter, more particularly at that time when Emergency was in full force. He added that there could at such time be no full discussion nor full reporting of the arguments. He also challenged the Press to report what he said in court. My feeling and that of some of my colleagues was that the height of eloquence to which Palkhivala rose on that day had seldom been equalled and never surpassed in the history of the Supreme Court”.

Next day Chief Justice Ray dissolved the bench and did not proceed with the matter. Many believe that Palkhivala’s impassioned oration in this case (which I heard partly on the second day) was the greatest blow for preserving the Constitution and securing the gains of the decision in the Fundamental Rights Case.

Nani Palkhivala is no more but we the citizens of India will continue to enjoy the blessings of liberty and the great constitutional rights, which he so successfully defended and preserved for posterity.

2. Nani Palkhivala appeared for Indira Gandhi.

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Cry Freedom

*This article was published in the Indian Express on 15 March 2004.
It was triggered by Justice H.R. Khanna's presence at a
Supreme Court Bar function. His great dissent in the
Habeas Corpus case and his supersession are described.*

Recently on the lawns of The Supreme Court, President A .P. J. Abdul Kalam spoke at a function to honour Nani Palkhivala. A frail but erect, old gentleman occupied the front row. Some young members of the Bar inquired who he was. He was none other than Justice H. R. Khanna. I resolved that day to share with a wider circle of young lawyers and citizens the story of his matchless courage.

In a democracy, it is essential to share with each new generation the experiences of the past great sacrifices made for the cause of the independence of the Judiciary, the Rule of Law and Human Rights. On January 28, 1977 Justice Khanna was superseded for appointment as Chief Justice of India. He sent in his resignation on that very day, but effective on March 12, 1977. It is almost 27 years to the day. The Habeas Corpus Case was the trigger which led to his supersession and resignation.

Indira Gandhi lost her election case on June 12, 1975 and on her appeal in the Supreme Court she was only granted a conditional stay. As a result, she could neither vote nor speak in the Lok Sabha. She became a dysfunctional Prime Minister. Immediately thereafter, on June 25, 1975, she proclaimed a state of Internal Emergency. In a midnight swoop, most of the prominent Opposition leaders including Jayaprakash Narayan, Morarji Desai, Atal Bihari Vajpayee and L.K. Advani were detained without charges and trial. The fundamental rights to life and liberty (Article 21) and equality (Article 14) were suspended. Many persons were detained and presented petitions of *Habeas Corpus* for their release on the ground that such orders were *ultra vires* and beyond the statute or were malafide.

A Bench of five judges of the Supreme Court (C.J. Ray, Khanna, Beg, Chandrachud and Bhagwati) heard what has come to be known as the *Habeas Corpus Case* (*ADM Jabalpur v. Shivakant Shukla*). The only question before the court was whether a petition for *Habeas Corpus* and other similar petitions

under Article 226 were maintainable (notwithstanding the suspension of the fundamental rights) on the ground that the orders were beyond the statute or were issued malafide or were not in accordance with law.

Shanti Bhushan led the argument. Ram Jethmalani, Soli Sorabjee and I came from Bombay to argue for various detenus. N.M. Ghatate was actively in the fray. We thought our case was unanswerable with nine High Courts in our favour. We were grievously wrong. On April 28, 1976, four judges decided in favour of the Government holding that the petitions were not maintainable. Justice Khanna was the lone dissenter. The argument which was accepted by the majority was that even if a person is tortured or deprived of his property, or his wife is spirited away, or members of his family are detained or harassed without legal authority or malafide there was no remedy and the Courts doors were closed. This was a complete negation of the Rule of Law which means that no Government officer can act against a citizen or his property unless authorised by some law or rule.

Justice Khanna, in his autobiography, writes about the *Habeas Corpus* Case graphically. He says: In view of his (Attorney General's) submissions, would there be any remedy if a police officer, because of personal enmity, killed another man? The answer of Mr De (Attorney General) was unequivocal: Consistently with my argument, he said, there would be no judicial remedy in such a case as long as the Emergency lasts.

His dissent rejecting the Attorney General's argument held the petitions maintainable. It was the only light in an atmosphere of total gloom. But the reaction in other democratic countries was heartening. *The New York Times* on April 30, 1976 came out with an editorial which has become classic and is cherished by many of us who lived through those dark days.

"If India ever finds its way back to the freedom and democracy that were proud hallmarks of its first eighteen years as an independent nation, someone will surely erect a monument to Justice H.R. Khanna of the Supreme Court. It was Justice Khanna who spoke out fearlessly and eloquently for freedom this week in dissenting from the Courts decision upholding the right of Prime Minister Indira Gandhi's Government to imprison political opponents at will and without court hearings... The submission of an independent judiciary to absolutist government is virtually the last step in the destruction of a democratic society; and the Indian Supreme Courts decision appears close to utter surrender."

In 1977, on the principle of seniority, Justice Khanna was due for appointment as Chief Justice of India. His dissent in the *Habeas Corpus* Case sealed his fate. On January 28, 1977 Justice M.H. Beg, who had decided in favour of the Government, was appointed Chief Justice of India, superseding Justice Khanna.

By the oath of office, a judge has to perform his duties without fear or affection or ill will. In politically sensitive cases, many a judge asks himself the question how will my decision affect me personally and my future prospects? Will it displease the powers that be? It is to Justice Khanna's eternal credit that the question went through his mind when he told his sister before delivering his judgment. I have prepared my judgment, which is going to cost me the Chief

Justice-ship of India. He remained true to his oath and displayed neither fear nor favour to a most powerful and tyrannical Executive.

A lesser man would well have agreed with the majority of four without jeopardising his Chief Justice-ship. It was Justice Khanna's finest hour. He became a beacon and a symbol of selfless courage and lion-hearted resolve to stand up for what he considered to be right without regard to personal consequence. Today he is still among us, honored and venerated by members of the Bar and Bench wherever he goes.

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V.M. Tarkunde – A Tribute

This article was written on 24 April 2004 and published by the Indian Radical Humanist Association, Mumbai and is a tribute to the late V.M. Tarkunde, a pillar of the Radical Humanist movement, judge, constitutional lawyer in the Supreme Court and co-founder of the Citizens for Democracy (CFD) and the Peoples Union for Civil Liberties (PUCL).

Tarkunde's glorious inning came to an end in his 95th year - and what an inning! His activities and the breadth of their reach were truly amazing. His stamina and energy were unbounded. In his young days, a social activist and a grass root worker, later, a Congress socialist, general secretary of the Radical Socialist Party, a pillar of the Radical Humanist movement, an outstanding lawyer in Bombay, a successful judge in the Bombay High Court, a preeminent constitutional lawyer in the Supreme Court, one of the co-founders of and moving spirit in the Citizens for Democracy (CFD) and the People's Union for Civil Liberties (PUCL), a prolific and analytical writer, author and contributor of numerous independent reports on Human Rights, honoured as "Humanist of the Year" in 1978, nominated as Humanist Laureate by the American Academy of Humanism of USA in 1984, and awarded Padma Bhushan in 1998.

What a remarkable curriculum vitae!

How did he find time and energy for all these activities?

It is said that "to live is to function that is all there is to living". Tarkunde functioned in so many fields and devoted his energy to so many causes that he compressed and distilled a hundred lives into one.

He had a vision of a modern, vibrant India, of a partyless democracy, of the right of every Indian and every human being to live and die in dignity. Something of this vision rubbed off on anyone who interacted with him. His enthusiasm and dedication to causes espoused by him were infectious.

Indira Gandhi, in June 1975, declared an Internal Emergency and many prominent Opposition Leaders were detained without trial. Tarkunde was one of the first to contact Jayaprakash Narayan and Morarji Desai during their detention. He was in constant touch with them. He appeared in many *Habeas Corpus* petitions challenging illegal detentions. He organized, participated and spoke in

meetings all over India protesting against the Emergency. Jayaprakash Narayan in 1974 had foreseen the coming storm and the possible eclipse of fundamental freedoms. Motivated and inspired by Jayaprakash Narayan, Tarkunde was principally instrumental in establishing Citizens for Democracy (CFD) in 1974. This organization excluded active politicians from membership and never took any financial help from foreign organizations. Under Tarkunde's leadership and guidance CFD became a credible vehicle and a potent force protecting attacks on fundamental freedoms. Tarkunde's role during the Emergency was his finest hour.

My first exposure to Tarkunde was when he was a judge of the Bombay High Court. He sat initially on the Appellate side but was later assigned Original Side work. He was opposed to the retention of the dual system of counsel and solicitor on the Original side. Many Seniors on the Original Side feared that he would use the opportunity to work for the abolition of the dual system and the Original Side. But they had misjudged him. Tarkunde had a rational mind and a modern approach, and was always open to fresh ideas and new impulses. He was neither a prisoner of prejudices nor a prey to narrow biases. He had intellectual integrity and was bold enough to change his views. After working as a Judge on the Original Side he was frank and open enough to appreciate the strength and contributions of the dual system and the Original Side. It is to his undying credit that he came to scoff at the dual system but became an admirer of its functioning. While trying commercial and long causes, he would quickly grasp the strong and weak points of both sides and would make suggestions for a settlement. In a vast majority of cases, senior counsel of both sides would put their heads together to fashion a reasonable compromise. They had the detachment, independence and stature to convince the clients. Many a heavy litigations were settled before him saving considerable judicial time and Tarkunde was greatly impressed by the Original Side Bar.

On occasions Tarkunde's penchant for arriving at a just decision would make him bend and stretch the law to breaking point. In one case, I recall, when snap answers were taken in cross-examination to buttress a technical defense, Justice Tarkunde said to counsel something to this effect "I am not going to record these answers", and softly laughing as was his wont added "You can complain to the Appeal Court about it".

Tarkunde was an avid golfer. He was steady and not flashy, meticulous in his technique and thorough in his approach. In the mid seventies, on my frequent short visits to Delhi, my friend Murlidhar Bhandare arranged many fourballs at the Delhi Golf Course. Tarkunde, Justice Y.V. Chandrachud, Bhandare and I spent many happy hours on the golf course. But I must share a secret with you. The majority judgment in the now notorious *Habeas Corpus* Case (*A.D.M. Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521, knocked out the locus of citizens to approach the courts challenging detentions, ill-treatment and attack on their personal liberties during the Emergency. Chandrachud sided with the majority in favour of the Government. Tarkunde was so disillusioned by the majority judgments that he wrote a very strong article in the 'Radical Humanist' characterizing the judgement as "Judicial Suicide". On reading the

article I congratulated him. He laughed and said he was prepared to face contempt of court. For a considerable time thereafter he showed his displeasure by refusing to play golf with Chandrachud. His commitment to a public cause far outweighed his personal relationship.

Reflecting on Tarkunde's many achievements, I asked myself the question - What distinguished Tarkunde and made him special? Was it originality of thought? Was it his great concern for the havenots? Was it his indomitable courage to espouse unpopular causes involving attacks on human rights? Was it his brilliant analytical and rational approach and incisive grasp of contemporary social, economic and political problems? Was it his enormous contribution by way of articles and writings? Was it his hard work and dedication? And yet after enumerating all this in my mind I thought I was missing something. Many have been blessed with all the above qualities and skills but do not measure up to Tarkunde. And then suddenly it struck me that Tarkunde had all these and something more which contributed to his extraordinary achievements. He had the invaluable gift of easily developing a close relationship and an effortless bonding with the young and idealistic grass root worker. He took to them warmly, and they fondly responded drawing inspiration and guidance from him and translating his vision into reality.

Vithal Mahadeo Tarkunde is no longer with us. He was named after the Hindu Gods but he did not believe in God, though endowed with many qualities of which even gods would be envious. He was a rationalist with a razorsharp intellect and yet he was full of compassion and sympathy for the underdog. A lawyer par excellence, but his lawyering was only a means to an end. Law was never his main pursuit. His success as a lawyer acted as a springboard for enabling and empowering him to espouse causes dear to his heart.

Tarkunde was a universal spirit illumining all climes and all times. He belongs not to our generation alone but to all future generations. He was truly a nation-builder, a crusader in the battle for freedom, justice and human rights.

This is my small tribute to a great son of India.

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H.M. Seervai – Random Memories and Recollections

This article was written at the request of Feroza Seervai for the book “Evoking H.M. Seervai” compiled for his Centenary by Feroza Seervai in December 2004, which was published later. It characterises Seervai’s influence on the Bar and the Bench and the numerous issues which he embraced with a crusader’s zeal. The author characterizes him as “the Warrior Prince of the Bombay Bar, a Knight in shining armour of the law.”

I

FIRST THOUGHTS

When Feroza invited me in February 2004 to contribute my memories and recollections to a book to commemorate Seervai - a celebration of his life - I felt honoured and thrilled.

The Indian oral tradition down from the ‘Vedas’ is of ‘Shruti’ and ‘Smriti’ – what one has heard and what one remembers. My recollections about Seervai are an amalgam of memories, recollections and events heard and believed. Some will be of interest to the general reader and many to the brotherhood of lawyers. They have passed into the collective memories of my contemporaries and seniors at the bar and form a rich heritage of traditions and timeless ideals. Many of them are worth preserving for posterity. We must rejuvenate and reinvent ourselves in the legal profession by learning the lessons from the inspiring messages which emerge. They are a treasurehouse of many battles which Seervai fought and won, of victories celebrated and defeats borne with fortitude and a philosophical smile.

It was during the Emergency in the latter half of 1975 that I received a telephone call in the morning at my Bombay residence. “This is Seervai speaking – Divan, I believe you are going to argue for some of the detenus who have

been preventively detained in the Supreme Court regarding the maintainability of a *Habeas Corpus* petition. I have some points which I would like to discuss with you”.

A meeting was arranged. So my wife Smita and I met Seervai and Feroza at the P.V.M. Gymkhana one evening. We were entertained to tea and snacks and we had a fruitful discussion. He particularly stressed that the doctrine of *ultra vires* was independent of fundamental rights and referred to the famous case of *Eshugbayi Eleko v. Officer administering the Govt, of Nigeria*, (1931) AC 662 (670) followed by our Supreme Court in many cases where Lord Atkin said:

“In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the Executive.”

He also drew my attention to the right of self-defence both under the Indian Penal Code and the Law of Torts against an illegal attack on personal liberty. Notwithstanding the Presidential order suspending fundamental rights, Seervai’s view was clear that a *Habeas Corpus* petition was maintainable.

Initially it was widely known that Seervai’s stance on the Emergency of 1975 was ambiguous. He had just resigned as Advocate-General of Maharashtra in 1974. He was an outspoken critic of various decisions of the Supreme Court including the *Golaknath* case, the *Bank Nationalization* case and the *Kesavananda Bharati* case (the Fundamental Rights Case), but his perception of the Emergency and its excesses gradually changed. It hardened after the *Habeas Corpus* judgment (*A.D.M. Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207 delivered on 28th April 1976 and the punitive transfers of independent judges with a view to overawe them. In fact he successfully fought, *pro bono*, the petition of Sankalchand Sheth, (a High Court Judge transferred from Gujarat to Andhra Pradesh against his wishes) before a full Bench of the Gujarat High Court [(1976) 17 Gujarat Law Reporter 1017].

In 1978, Seervai wrote the most severe condemnation of the majority judgments in the *Habeas Corpus* Case in words worth recalling:

“The four judgments were delivered in the darkest hour of India’s history after independence and they made that darkness complete. . . Ordinary men and women could understand Satan saying “Evil be thou my good” but they were bewildered and perplexed to be told by four learned judges of the Supreme Court that in substance, the founding fathers had written into the Emergency provisions of our constitution “Lawlessness be thou our law””.

This strong criticism from a lawyer who argued for the Government in the Fundamental Rights Case which led to the supersession of three seniormost judges was remarkable. How Seervai gradually changed his opinion on the doctrine of the un-amendable basic structure of the Constitution as laid down in the Fundamental Rights Case will be recalled by me a little later.

II

A KNIGHT IN SHINING ARMOUR

When I joined the Bar and started practicing in January 1952 I joined the chambers of M.L. Maneksha, Bar-at-Law. Maneksha was a great lawyer and a distinguished advocate but above all he was known for his strict ethical standards and his impeccable integrity and etiquette. Later, I discovered that Seervai was Maneksha's first pupil while studying for the Original Side Advocate's Examination. On passing the examination, he joined the chambers of J.B. Kanga.

Even before I joined the Bar I had heard about Seervai through my uncle B.J. Divan who was practicing on the Original Side of the Bombay High Court. Seervai was an examiner for the Original Side Examination which was a very tough examination and many candidates took it in parts but Seervai passed several outstanding students namely R.J. Joshi (later his junior), R.M. Kantawala, (later Chief Justice of Bombay) and B.J. Divan (later Chief Justice of Gujarat) in one shot. Seervai affectionately bonded with them in the Bar library and acted as friend, philosopher and guide. They were appreciative of Seervai's encouragement to them in their early briefless and disheartening days and always turned to him for advice.

Seervai was an indefatigable fighter in causes which he believed in, particularly when he was convinced of unethical conduct compounded by injustice. He would pick up the gauntlet and would tenaciously pursue the cause unafraid of personal consequences. He was the Warrior Prince of the Bombay Bar, a knight in shining armour of the law. I would like to recount a few of these battles.

Before I joined the Bar Seervai took up cudgels on behalf of his junior ("Devil" as per the idiom at the Bombay Bar) the late R.J. Joshi. A senior judge sitting on the original side whose son was also practicing made remarks on several occasions disparaging of Joshi and other junior advocates in open court. Remarks which were perceived by Solicitors to be to the disadvantage of those juniors and which would indirectly benefit the judge's son. Seervai meticulously collected the material and walked up to Chief Justice Chagla with his complaint. Suddenly, overnight Chagla in an unprecedented move transferred the judge to the Appellate Side from the Original Side. The concerned Judge (later elevated to the Supreme Court) was a liberal and fearless judge who was a champion of citizen's rights and who would stand up to Government but his paternal feelings clouded his judgment.

The Bombay City Civil Court Bench has contributed many distinguished judges to the High Courts and the Supreme Court. The Court was established in 1948 and many bright young members of the Bar were attracted to go on the City Civil Court Bench and rise with seniority to become Principal Judges with an opportunity to be elevated to the High Court. The Principal Judge of the Court was normally selected on seniority basis in that court. Justice J.M. Shelat was one such example who became Chief Justice of Gujarat and later a Judge of the Supreme Court.

Three outstanding senior judges in the City Civil Court namely B.J. Divan, V.D. Tulzapurkar and J.R. Vimadalal were overlooked and a favorite was appointed as Principal Judge from the Districts with the concurrence of Chief Justice Chainani. The three judges threatened to resign but were advised by Seervai, then the Advocate-General, to hold their hands as he was taking up the issue. With matchless courage and supported by the Bar, Seervai campaigned with the Government and consequently the decision was reversed and the injustice remedied. He came in confrontation with Chief Justice Chainani who was the first service judge appointed as Chief Justice in the Bombay High Court. It required extraordinary courage to lobby with the Government against the views of the sitting Chief Justice. Seervai was willing to take up the cause which he found just disregarding personal consequences to his own career. Later B.J. Divan became Chief Justice of Gujarat but during the Emergency was punitively transferred to Andhra Pradesh as Chief Justice; V.D. Tulzapurkar was elevated to the High Court and later to the Supreme Court and proved to be one of the most fearless outspoken and courageous judges to stand up to the Government. J.R. Vimadalal because of his liberal judgments in preventive detention matters during the Emergency was punitively transferred to Andhra Pradesh even though he had a very short time before retirement.

The Supreme Court was slated to hear a case involving discriminatory compensation being given - more for normal land acquisitions but less for Housing Schemes. The question was whether such laws fell foul of Article 14. In some cases in Bombay, solatium was denied by law. A member of the Bombay Bar, Naval Gamadia was heir to a large piece of land with a small bungalow on the Gamadia Hill Estate which was under acquisition. [This piece of land has been now completely developed and a huge commercial complex called "Heera Panna" stands just opposite Haji Ali in Bombay.] Gamadia found that Chief Justice Gajendragadkar was presiding over the Bench who happened to be a member of a Housing Co-operative Society which would benefit if the laws were valid. Thus there was a pecuniary angle as far as the Chief Justice was concerned. Seervai devoting considerable time and energy prepared a note on the law of disqualification of a judge for pecuniary bias to help Gamadia so that an objection could be taken. Such an objection was unprecedented and most of the counsel appearing were unwilling to offend a strong Chief Justice like Gajendragadkar by raising such an objection. However one of the fearless doyens of the Supreme Court Bar, Purshotam Tricumdas raised the objection. Gajendragadkar initially was taken aback and appeared hesitant to recuse himself. However C.K. Daphtary then Attorney-General who was appearing for the State in his usual inimitable style said that no party should have even a feeling of possible bias in the highest court in the land and it would be wise not to participate. Gajendragadkar had no option but to opt out of the Bench and ultimately Justice K. Subba Rao presided and the petitioners succeeded in invalidating the discriminatory laws. (AIR 1965 SC 1017, *Vajravelu Mudaliar v. Special Deputy Collector* and AIR 1965 SC 1096, *N.B. Jeejeebhoy v. Assistant Collector*).

(Seervai refers to this case in "Constitutional Law" 4th Edn., Vol. II, page 1736 footnote 77)

In the early fifties *ad-valorem* court-fees were sought to be imposed on the Original Side Suits in Bombay. Young Advocates were apprehensive that this additional burden on the litigants would mean that junior briefs from solicitors would dry up and they would have no future at the Bar. Some of them wanted the dual system of solicitor and counsel to be abolished so that advocates could file their appearances on the original side. Mr. Seervai and K.T. Desai at great personal cost in terms of time, energy and work went from table to table in the Bar Library persuading young counsel like me that the dual system had great virtues. They also worked out a scheme by which advocates in good practice would voluntarily designate themselves as seniors and would desist from accepting a brief unless briefed with a junior counsel. This was at a time when the distinction between Senior Advocates and Advocates introduced by the Advocates Act, 1961 was not in operation. As a result the Resolution moved to recommend abolition of the dual system in the Bar Association was defeated and the dual system remained current for many years. Many of us were beneficiaries of that continuation. One does not know who would have made good or even continued at the Bar if the dual system had been abolished.

The Centenary of the Bombay High Court was to be celebrated in 1962. P.B. Vachha a senior and leading member of the Bar and a master of the English language was requested by Chief Justice Chainani to write a history of the Bombay High Court on that occasion. Vachha stipulated that he should have a free hand to express his views and comments. However when the manuscript reached the High Court, objections were raised to some of the views expressed. A *via-media* was arrived at that in the beginning of the book it should be mentioned that:

"The opinions expressed in this book represents the opinions of the writers and the statements of facts made therein have been made by the writers on their own responsibility".

The book would be published by the highest officer of the Court namely the Prothonotary in his capacity as the Secretary of the Centenary Celebrations Committee. However one objection remained which Vachha was not willing to delete *i.e.*, his postscript to the second Tilak trial in Chapter XV (*See Vachha Famous Judges, Lawyers and Cases in Bombay* Preface Page (v) and (vi) and pages 264 to 271).

At the end of the second Tilak trial for sedition Bal Gangadhar Tilak spoke his famous words:

"all that I wish to say is that, in spite of the verdict of the jury, I still maintain that I am innocent. There are higher powers that rule the destinies of men and nations; and I think it may be the will of Providence that the cause I represent may be benefited more by my suffering than by my pen and tongue".

Tilak was sentenced by the judge to six years transportation and a fine of Rs. 1000. This trial took place in 1909. These words of Tilak are now inscribed

on a marble tablet fixed outside the Central court where he was tried. Vachha in his postscript was critical of the speech of Chief Justice Chagla on that occasion and made his comments in the postscript. He said among other things:

“The Chief Justice’s speech was admirably patriotic or patriotically admirable; but legally and judicially inexplicable and indefensible and was delivered from a wrong platform” (Vachha page 270).

Vachha was not willing to remove this postscript. As a result Vachha writes in his Preface:

“... the High Court was of the opinion that it would not be proper to include the postscript in a Commemorative Volume published at the time of the centenary. I was thus faced with the alternative of either withdrawing the postscript from my history or withdrawing my history from the High Court; and the latter course appeared to me to be the obvious path of duty”.

It was at this juncture that under the leadership of Seervai, then Advocate General that a Committee was formed to publish Vachha’s history including the postscript. The Committee consisted, among others, of K.M. Munshi, G.N. Joshi, A.G. Mulgaonkar, Murzaban Mistree, Porus Mehta, S. Baptista, N.A. Palkhivala, R.D. Chadha and Atul Setalvad. Again Seervai through his leadership made possible the publication of Vachha’s invaluable history written in a delightful epigrammatic style for posterity.

Seervai was a great admirer of Chief Justice Chagla but he thought he had a higher duty to the freedom of speech and expression. He believed in that famous quotation attributed to Voltaire “I may disapprove of what you say, but I will defend to the death your right to say it”.

III

KESAVANANDA BHARATI – EMERGENCY – SEERVAI’S CHANGED RESPONSE

Nani Palkhivala commenced his arguments on Oct 31st 1972 in the *Kesavananda Bharati v. State of Kerala* (Fundamental Rights Case) (AIR 1973 SC 1461). I was briefed on behalf of the sugar factories of Maharashtra and was supporting and assisting Nani Palkhivala for the petitioners and was throughout present at the hearings. The arguments concluded on 23rd March 1973 and the judgment was delivered on 24th April 1973. On the next date three senior most judges of the Supreme Court namely,—J.M. Shelat, K.S. Hegde and A.N. Grover were superseded and A.N. Ray was appointed Chief Justice of India. This was the first major assault on the independence of the judiciary and led to countrywide protests.

Seervai was then Advocate-General of Maharashtra and had represented the State of Kerala in the Fundamental Rights Case. Seervai’s position was non-committal and ambiguous at the time of the supersession. He continued to be Advocate-General till his resignation in 1974. He had firm views that the Golaknath case was wrongly decided and that the Supreme Court had erred in propounding the doctrine of basic structure in the Fundamental Rights Case. This

doctrine fettered and restricted the amending power of Parliament. But all this changed gradually but decisively as the excesses of the Emergency snowballed and the extreme contentions in *Indira Gandhi's Election* case (*Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299) were argued. Seervai's outraged conscience found expression in his later comments on the judgment in the *Habeas Corpus* case which have already been mentioned above. His considered views on the basic structure doctrine are now clarified in *Seervai Constitutional Law of India* (3rd Edn.) Vol. II, pages 2686 and 2692. To quote:

"We can now answer the question: does the doctrine of the basic structure provide a correct interpretation of Article 368 ? It is clear from our discussion that it appears to be the only doctrine which supplies an answer to the question" (Page 2686 para 30.71)

"Coming to the second answer, our discussion has shown that the consequences of rejecting the doctrine of the basic structure would be so grave, and so opposed to the objectives of the Constitution, that the consequence of uncertainty would be insignificant by comparison. This is all the more so because the Kesavananda doctrine has neither prevented an amendment of the Constitution in the public interest nor the enactment of socio economic laws . . . " (Para 30.77 at page 2692).

This 180 degree turn in Seervai's views was because of several reasons. First, in the Fundamental Rights Case the amending power and its width was discussed in the light and context of property rights. Secondly, in the Indira Gandhi Election Case the widest amendment power was claimed even to subvert the democratic basis of our polity and interdict and override the judicial power by a constitutional amendment attempting to decide a case in favour of a candidate who was disqualified for corrupt practice. But apart from this the abuse of powers during the Emergency, namely, preventive detention without trial of Opposition Leaders and other activists, rushing through far-reaching constitutional amendments in a rump Parliament, the complete muzzling of the Press, the ill treatment of detenus, Press censorship of court judgments which were against the Government and attacks on judicial independence must have decisively influenced Seervai's thinking.

Seervai's arguments, which I heard in the Fundamental Right's case could not be ranked as one of his best performances. There must have been several reasons but a couple of them can be identified. First, Seervai had made it a condition with the then Law Minister H.R. Gokhale that he would only accept the brief provided he would have the first word and lead arguments for the respondent Government. In other words he would precede the arguments of the Attorney-General Niren De. Thus there was continuous tension in the Respondents' team. Everyone knew about this and so did the Attorney-General. Every effort must have been made by the Attorney-General to overturn this decision till the last moment. If the Attorney-General had started the arguments Seervai would have definitely returned the brief and disassociated himself from the case. This dissension was only publicly resolved at the conclusion of Palkhivala's argument when the turn of the respondents came and the Attorney-General requested Seervai to start on the ground that he had other international commitments .

This internal conflict between the Attorney-General Niren De and the Advocate General Seervai must have been heightened by the fact (then unknown to us on the petitioner's side) that Seervai had been offered the office of Attorney General by H.R. Gokhale which he had declined in September 1971.

Secondly, the principal reason for forming a Bench of 13 judges was to test the correctness of the Golaknath decision which had held that fundamental rights could not be amended and to test the validity of Constitutional Amendments made to overcome that judgment. Seervai's preparation therefore was mainly directed to this issue. However Chief Justice Sikri guided the arguments in the case to another question which became central namely, inherent or implied limitations on the amending power of Parliament. This was a much wider issue on which the respondents may not have had sufficient time to focus and prepare.

Seervai's performance and arguments though impeccable were not one of his outstanding performances. It is difficult to speculate the reasons but some of them I have outlined above.

Part of the inside story before the judgments in the Fundamental Rights Case has now been unravelled and is worth recalling.

Justice Jaganmohan Reddy's (a member of the Bench in the Fundamental Rights Case) remarks in his autobiography 'The Judiciary I served' (pg. 230):

"Gokhale brought Seervai who only accepted on condition that he would begin on behalf of the respondents and Niren De would come after him. Ray and I however, protested. We said the Attorney-General had precedence and he should begin and pointed out that the Chief Justice, Shelat and Hegde in the Bank Nationalization Case had said that this reversal of order could not be allowed. In any case Chief Justice Sikri later said it is for both Seervai and De to settle the issue and if De permitted Seervai could start first. This, of course, was right but evidently by then at the instance of Gokhale, De was asked to give way to Seervai. I understand on authentic information that De had gone to the Prime Minister and complained. She asked him to come and see her again and when he did she told him that there was nothing she could do because she was dependent on the advice of the legal members of her cabinet. De quietly lumped this insult and later tried to make a virtue of it".

Some of the other observations of Justice Jaganmohan Reddy are worth recording:

"Seervai was most courteous and his court manners were unexceptionable except when it came to views held by the Court being contrary to the views expressed by him in his book on the Constitution." (page 230).

"There were clear indications that the Government while awaiting the decision knew what the decision would be before it was delivered and had already made up its mind to supercede three Judges to make Ray J. Chief Justice." (page 242).

Justice Reddy narrates how at a dinner prior to the delivery of the judgment (not noticing that Justice Reddy and his wife were within hearing distance) Kumaramangalam and Ray J. conversed:

“When Ray and his wife came near the door Mohan Kumaramangalam shook hands with Ray and said “Congratulations Next Week”. Ray held Mohan’s hand, gave a smile while bending his head to one side to show his appreciation or thanks”. . . “In the morning when we met on our walk I asked Ray, “what was Mohan congratulating you for ?” He said, “I don’t know, perhaps it is because we will be delivering our judgment next week” “I said, why congratulate you alone, I am part of the Bench too. He said he did not know”. (page 243).

Justice Jaganmohan Reddy further remarks:

“There was one occasion when Dwivedi made a startling proposal to Palkhivala. He said if he (Palkhivala) agreed to property rights being taken away he (Dwivedi) would get Parliament to declare that other Fundamental Rights would not be taken away. Palkhivala replied: “Have I referred so far at any time to property rights? I was dealing with implied limitations and natural rights, etc.” (Page 227).

IV

A FINAL WORD

In December 2000, Feroza Seervai presented me with a collection of Essays, Speeches, Letters and Tributes edited by her called “The Seervai Legacy”. I gathered from her article that the word “Seervai” comes from ‘sher-vai’ which means ‘like a lion’. Seervai came from a long line of master builders of the Mazgaon Docks in Bombay who were noted for inflexible integrity and moral courage.

On reflection, I realized what I owed to Seervai. Seervai never passed any work to me and I was only briefed independently in a very few matters with him. Nor did I work closely with him. But the high standards of integrity, ethics, fairness, and fearlessness which he set at the bar had an immense effect on many of us. He was an icon worth emulating if one could stay the course and was not bewitched by prizes which politicians could offer. In that sense I consider myself a beneficiary of the “Seervai Legacy”.

In my reply to Feroza for her kindness in presenting me the “Seervai Legacy” I replied on December 22nd 2000. I reproduce below portions of my letter.

“Seervai’s words and example have inspired many of us at the Bombay Bar. In my formative years at the Bar, Motilal Setalvad as Attorney-General and Homi Seervai as Advocate-General were two shining examples of independent fearless advocates who had reached the top of the profession without indulging in unethical practices and without fawning on politicians and developing rapport with the powers that be. Unfortunately, it is a different world now”.

“It was a revelation to me that Seervai is derived from ‘Sher-vai’ “like a lion”. Homi was undoubtedly a lion at the Bar, but he was more, he was a role model for the young and rising advocate”.

“It is a sad commentary on our leaders that after 17 years of his distinguished tenure as Advocate General, he received no word of appreciation from the Government. I am reminded of what M.C. Setalvad has written in his autobiography, “My Life” about a similar experience when he demitted office as the first Attorney-General. He was treated similarly by the then Prime Minister Nehru. In contrast he mentions the courtesy and appreciation shown to him by a letter written by Sir Roger Lumley then Governor of Bombay when Motilal resigned as Advocate-General of Bombay as a result of the freedom struggle. So Seervai was in good company”.

“Seervai’s views on the duties of a Law Officer be it Advocate-General or Attorney-General are refreshing. He regarded the duty of a Law Officer to represent the public interest and act independently of the government. Current practices in India, are now more tailored to the practices of what Seervai has referred to as Mr. Worldlywiseman and Mr. Facing bothways”.

“It was a wise decision on your part to have published this Collection even though it is only a part of the Seervai Legacy. As you have said in your introduction the book recalls the man and the mind. And what a man !”.

The above extracts from my letter encapsulate my small tribute to a great lawyer, an incomparable builder like his forefathers who contributed immeasurably to legal learning and ethics but above all who displayed indomitable courage to fight for his beliefs and convictions ignoring all consequences to his personal fortunes.

Surely, one would like to think of him as the Warrior Prince of the Bombay Bar, a Knight in shining armour of the law.

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A Profile in Judicial Courage

This article was published in the Hindu on 7 March 2008 after the death of Justice H.R. Khanna on 25 February 2008.

On February 25, 2008, Justice Hans Raj Khanna passed away at the age of 95. He stood for all that is respected and admired in a great judge — patience, courtesy, wisdom, but above all courage. A courage unsurpassed by any other judge of the Supreme Court since Independence.

Khanna was born in 1912, joined the Bar in 1934, was appointed a District and Sessions Judge in 1952 and was elevated to the Punjab High Court in 1962 and finally to the Supreme Court in 1971.

He has become immortal in the collective memory of the legal profession because of his judgment in 1973 in the fundamental rights case (Kesavananda Bharati). This judgment tilted the balance seven to six against the government, and curtailed the unrestricted power of Parliament to amend the Constitution on the doctrine of an un-amendable basic structure. Outspoken critics of the judgment like H.M. Seervai, a great constitutional lawyer, changed their view after seeing the excesses of the Emergency.

Habeas Corpus Case

But Justice Khanna's finest hour came on April 28, 1976 when he delivered his lone dissent in the habeas corpus case.

Indira Gandhi lost her election case on June 12, 1975 and on her appeal in the Supreme Court she was only granted a conditional stay. As a result, she could neither vote nor speak in the Lok Sabha. She became a dysfunctional Prime Minister. Immediately thereafter, on June 25, 1975, she proclaimed a state of Internal Emergency. In a midnight swoop, most of the prominent Opposition leaders, including Jayaprakash Narayan, Morarji Desai, Atal Bihari Vajpayee and L.K. Advani, were detained without charges and trial. The fundamental right to life and liberty (Article 21) and equality (Article 14) were suspended. The Press was gagged and censored and orders were passed not to report unfavourable court judgments. Many persons were detained and habeas corpus petitions were presented for their release on the ground that such orders were *ultra vires* and beyond the statute, or were *mala fide*.

A Bench of five judges of the Supreme Court (Chief Justice A.N. Ray; Justices Khanna, M.H. Beg, Y.V. Chandrachud and P.N. Bhagwati) heard what has come to be known as the *Habeas Corpus* case (*A.D.M., Jabalpur v. Shivakant Shukla*). The only question before the court was whether a petition for *Habeas Corpus* and other similar petitions under Article 226 were maintainable (notwithstanding the suspension of the fundamental rights) on the ground that the orders were beyond the statute or were *mala fide* or were not in accordance with law.

Shanti Bhushan led the argument. Ram Jethmalani, Soli Sorabjee and I came from Bombay to argue for various detenus. We thought our case was unanswerable, with nine High Courts in our favour. We were hopelessly wrong.

On April 28, 1976, four judges decided in favour of the government, holding that the petitions were not maintainable. Justice Khanna was the lone dissenter. The government's argument was accepted by the majority. The Supreme Court by a majority closed its door to the citizen and there was no remedy against illegal detentions, unauthorised demolitions, official tyranny, torture, murder, and mayhem. The Supreme Court sanctioned "the rule of lawlessness."

H.M. Seervai later commented: "The four judgments were delivered in the darkest hour of India's history after independence, and they made the darkness complete... ordinary men and women would understand Satan saying 'Evil be thou my good,' but they were bewildered and perplexed to be told by four learned judges of the Supreme Court, that in substance, the founding fathers had written into the Emergency provisions of our Constitution 'Lawlessness be thou our law.'"

Justice Khanna in his autobiography writes about the *Habeas Corpus* case graphically. He says: "In view of his (Attorney-General's) submissions would there be any remedy if a police officer because of personal enmity killed another man?" The answer of Mr. De (Attorney-General) was unequivocal: "Consistently with my argument," he said, "there would be no judicial remedy in such a case as long as the Emergency lasts"."

Heartening Reaction

Khanna's dissent rejecting the Attorney-General's argument held the petitions maintainable. It was the only light in an atmosphere of total gloom.

But the reaction in other democratic countries was heartening. *The New York Times* on April 30, 1976, came out with an editorial which has become a classic and is cherished by many of us who lived through those dark days.

It said: "If India ever finds its way back to the freedom and democracy that were proud hallmarks of its first eighteen years as an independent nation, someone will surely erect a monument to Justice H.R. Khanna of the Supreme Court. It was Justice Khanna who spoke out fearlessly and eloquently for freedom this week in dissenting from the Court's decision upholding the right of Prime Minister Indira Gandhi's Government to imprison political opponents at will and without court hearings... The submission of an independent judiciary to absolutist government is virtually the last step in the destruction of a democratic society; and the Indian Supreme Court's decision appears close to utter surrender."

Justice Khanna did not surrender. But it cost him his appointment as Chief Justice of India. He was superseded in January 1977 and Justice Beg who was next in seniority, appointed Chief Justice of India. Khanna promptly resigned. In his autobiography he writes of what he had told his sister, "I have prepared my judgment, which is going to cost me the Chief Justice-ship of India" — but he did not flinch or waver and remained true to his oath.

Justice Jackson of the U.S. Supreme Court said: "Judges are more often bribed by their ambition and loyalty than by money." Unlike his four colleagues, Justice Khanna did not succumb to ambition or loyalty. His judgment was reminiscent of Lord Atkin's celebrated dissent in *Liversidge v. Anderson* during the dark days of the Second World War when he invalidated an order of detention without trial and observed: "I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive-minded than the executive... In this country, amid the clash of arms the laws are not silent."

Justice Khanna in his dissent stated: "What is at stake is the rule of law... the question is whether the law speaking through the authority of the Court shall be absolutely silenced and rendered mute..."

His dissent does the Indian judiciary and the legal profession proud. The doctrine of basic structure which is now firmly rooted in our constitutional jurisprudence is his great gift to posterity. To adapt Winston Churchill's felicitous phrase, never did so many owe so much to a single judge.

He was enticed into becoming Law Minister in the Charan Singh government supported by Indira Gandhi in July 1979 but he suffered pangs of conscience and resigned in three days. Again, a principled sacrifice and the courage to recognise his error publicly.

His portrait adorns Court No. 2 in the Supreme Court. His courage and independence must continue to inspire and remind generations of lawyers and judges of the sacrifice he made in upholding human rights, the rule of law and the independence of the judiciary.

It is essential for each generation to share with successive generations the experiences and struggles of the past for preserving a constitutional democracy and the rule of law. It is an ever-greening process and Justice Khanna's role must encourage each one of us — judge, lawyer and citizen — to play our little part in this never-ending battle. This is my small tribute to a great son of India.

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Ram Jethmalani – 87 Not Out

This article was published in the Hindu on 8 November 2010 after Ram Jethmalani completed an eventful 87 years.

On September 14, 2010 the redoubtable Ram Jethmalani completed 87 years of an eventful and picturesque journey. Currently president of the Supreme Court Bar Association, past chairman of the Bar Council of India, Parliamentarian, former Minister, a leading member of the Opposition, author and publicist, Ram is a picture of perennial youth, immeasurable vitality and inexhaustible courage.

I thought I would share with readers of The Hindu some of the high points in his remarkable career, but this article got a little delayed because of the author's indisposition.

This piece is based on a speech made in April 2007 at the time Prime Minister Manmohan Singh released one of Ram's books titled *Conscience of a Maverick*.

When I was requested to make the speech in April 2007, I asked the organisers whether there were any do's and don't's and the response was that Ram loves freedom of speech — speak what you like. It is in that spirit — affectionate but not uncritical — that I write these few words.

I recall Oliver Cromwell's famous remarks to his portrait painter, Sir Peter Lely. He said, "Paint me as I am, do not leave the scars and wrinkles."

I will paint Ram as I know him, wrinkles and scars.

Ram and I share warm affection for each other and we have a penchant for fighting cases involving corruption in high places and mis-governance.

But we agreeably disagree on methods, norms and ethical dimensions. Ram floats on higher thermals in the Elysian fields where the normal rules of behaviour of mere mortals hardly apply.

Ram is fearless and forthright — on occasions, too forthright.

He is irrepressibly audacious with a sense of the dramatic. He has the gift of hitting the headlines but has a warm and golden heart. In politics he has gravitated through the whole spectrum — he believes that "A foolish consistency is the hobgoblin of little minds."

He wears his heart on his sleeve. He will confront openly and attack directly. He will not stab anyone in the back.

But these strengths and virtues are handicaps in Indian politics. As a result, he is a potent force in the Opposition, but uncomfortable on the treasury benches — and many of his colleagues on the treasury benches become even more uncomfortable in his presence.

Charles de Gaulle the great French President and World War-II hero said: “A good politician never believes what he says and he is very distressed when others believe him.”

Ram believes what he says and says it passionately and emphatically.

Recently he hit the headlines expressing his views on the Kashmir interlocutors that were radically different from those of the political party which brought him to the Rajya Sabha.

But above all Ram is an incomparable and matchless defence lawyer in criminal cases. In the Indira Gandhi assassination case, he won an acquittal for Balbir Singh who had suffered a death sentence.

In the case arising from a terrorist attack on Parliament, Ram won an acquittal for S.A.R. Geelani both from the high court and confirmed by the Supreme Court, even though the accused was awarded a death sentence by the trial court.

Ram fought these cases against the tide of popular opinion. It was a battle in the heroic mould.

There is nothing more rewarding for a lawyer than saving a client's life.

Ram's services as a defence lawyer are sought by powerful political leaders, cutting across party lines. That is his strength and forte.

Today the practice of criminal law is the road to fame and fortune and occasionally a seat in the Rajya Sabha.

During the Emergency (1975-1977), Ram's voice was loud and clear for which an arrest warrant was issued from Kerala. It was stayed by the Bombay High Court when over 300 lawyers led by Nani Palkhivala and including this author appeared for him. However the stay was nullified by the “*Habeas Corpus*” judgment (*A.D.M. Jabalpur v. Shivakant Shukla*) and Ram exiled himself in the United States carrying on his campaign against the Emergency. He returned to fight the elections in 1977 and ousted the serving Law Minister H.R. Gokhale from Bombay in the Lok Sabha Elections, and then started his political career as Parliamentarian, Minister and Opposition leader.

Today we have the blessings of the Right to Information Act (RTI), but it is important to recall that Ram, as the Union Minister of Urban Affairs in 1998, opened the files of his department for public scrutiny. The bureaucracy was stunned and ultimately scuttled it.

Ram has always unwaveringly supported the freedom of speech and expression, the liberty of the media, the rule of law and the independence of the judiciary. His writings bear testimony to this unflinching commitment.

The freedom of speech is our priceless heritage. We must all endeavour to preserve it and nourish it.

Ram Jethmalani, is in law, evergreen, ever-energetic, ever enthusiastic, never one to give up and reminds one of the evergreen cricketer Sachin Tendulkar. But his style is more in the Sehwag mould — brilliant, spectacular, audacious.

In 2007, I read a report that Ram had applied to the Supreme Court to take up his case early because his astrologer had told him that he might not be available after July. Obviously, he was a false prophet. My advice to Ram is not to believe astrologers and go on to hit a century with frequent sixes.

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Emergency Antidote

*This article was published in the Indian Express
on 19th November, 2015*

A significant milestone was reached on November 11, when Shanti Bhushan, a doyen of the legal profession and an advocate extraordinary, celebrated his 90th birthday. On occasion brusque, prickly and opinionated, his razor-sharp mind and good intentions disarm critics. His achievements are the stuff of legend. Shanti Bhushan earned national and international fame on June 12, 1975, when he won Raj Narain's election case, unseating Indira Gandhi.

Justice Jagmohan Lal Sinha of the Allahabad High Court held the prime minister guilty of electoral offences and set aside her election while imposing a mandatory disqualification under the law. Shanti Bhushan had reached the apogee of his forensic career and came to be known as a giant-killer. The events of 1975-77 are mostly unknown to young lawyers and citizens.

On her appeal to the Supreme Court for an unconditional stay, Gandhi was represented by the legendary advocate, Nani Palkhivala. Before the vacation judge, Justice V.R. Krishna Iyer, Shanti Bhushan succeeded against Palkhivala, who had argued for an unconditional stay. On June 24, 1975, Justice Iyer gave Gandhi only a partial stay — she could continue as an MP and PM but could not vote or participate in Lok Sabha proceedings.

On June 25, hardly 12 days after the election verdict and a day after the conditional stay, the internal Emergency was declared and many opposition leaders were detained without trial, including Jayaprakash Narayan, Atal Bihari Vajpayee and L.K. Advani. The press was muzzled, censorship imposed, and even judgments could not be reported. A pall of fear enveloped the country. Justice Iyer's conditional stay and Shanti Bhushan's victory in Allahabad earned them the unmerited distinction — unintended and unforeseen — of being the fathers of the Emergency.

Meanwhile, during the Emergency, the 42nd and other constitutional amendments emasculated judicial review, curtailed the powers of the higher judiciary, and almost extinguished and eclipsed fundamental rights. The Constitution was defaced and defiled.

In March 1977, the Janata party swept to power after defeating the Congress led by Gandhi. Shanti Bhushan became law minister. He masterfully managed Parliament and was the architect of the 43rd and 44th Amendments, which undid the damage caused by the 42nd Amendment. Shanti Bhushan's amendments not only repealed many of the malignant articles but revived judicial review and the powers of the higher judiciary, and restored Article 226 to its pristine glory. For this unmatched achievement, generations of Indians must be beholden to him. This was his finest hour.

His role in and contribution to fighting corruption in the judiciary displays matchless courage. He fought several cases representing the Sub-Committee on Judicial Accountability against Justice V. Ramaswami, whose impeachment failed in Parliament. He is not afraid of standing up to sitting CJIs when a question of judicial integrity is in issue. The case of Justice Ashok Kumar, who gave bail to M. Karunanidhi, needs to be recalled. The judge was appointed additional judge of the Madras High Court with seven others. He was not confirmed as a permanent judge by the collegium on grounds of doubtful integrity. Yet, he was given extensions as additional judge by two CJIs. Immediately on his appointment as CJI, K.G. Balakrishnan, without consulting the collegium, overturned the earlier decision, and appointed him as a permanent judge. Prashant Bhushan asked me if I would appear and question the appointment of Justice Kumar — this meant taking on.

CJI Balakrishnan. I said I had no hesitation, provided that the petitioners were high-profile individuals with a penchant for upholding judicial integrity. Shanti Bhushan and Kamini Jaiswal unhesitatingly agreed to be the petitioners.

We failed — although the SC bench made highly disparaging remarks against the extensions given by the two former CJIs, it upheld the appointment, showing deference to the serving CJI. The bench observed: "The then CJI should have stuck to the view expressed by the collegium and should not have been swayed by the views of the government to recommend extension of the term of Respondent Two for one year, as it amounts to surrender of primacy by jugglery of words".

Justice J. Chelameswar in his dissent in the NJAC case commented on this appointment: "It appears to have been a joint venture in the subversion of the law laid down by the second and third judges' cases by both the executive and the judiciary which neither party is willing to acknowledge."

There are some, like Shanti Bhushan, who never count their years but make their years count. Here's hoping he masters the "nervous nineties" and scores a century.

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A Unique Blend of Judicial Virtues

*This article was published in the Hindu on 15th November, 2014
Justice Krishna Iyer was not able to complete 100 years. Soon after
this article was published, he passed away on 4th December, 2014.*

Justice Vaidyanathapuram Rama Iyer Krishna Iyer was born on November 15, 1915, was sworn in as a judge of the Supreme Court on July 17, 1973 and retired at the age of 65 on November 14, 1980. He now starts his journey to complete a century.

Justice Krishna Iyer's elevation to the Supreme Court raised eyebrows and scepticism in many legal circles. I must confess that my scepticism soon turned into admiration.

Several judicial activists reached the Supreme Court of India in the mid-seventies. Justice Krishna Iyer wielded considerable influence on the thought processes of his colleagues such as Justice P.N. Bhagwati (later Chief Justice of India) and Justice Chinnappa Reddy. They were articulate, sensitive and had a strong desire to translate the vision of the constitution makers into reality.

A New Direction

By 1980, Justice Bhagwati and Justice Krishna Iyer became senior justices and took the Supreme Court in a new direction while evolving radical principles. Justice Krishna Iyer, a revolutionary at heart, principally triggered this internal revolution in the thought processes of his colleagues — a movement vigorously carried forward by Justice Bhagwati and Justice Chinnappa Reddy.

A new public interest jurisprudence was fashioned, the old 'locus standi' rules were jettisoned, epistolary litigation was encouraged and a strategy was evolved for giving relief to the disadvantaged and underprivileged. Procedural 'due process' was restored to centre stage, overruling earlier decisions. Consequently this radical transformation gave high international stature and visibility to the Supreme Court. It was an explosive enlargement of the court's jurisdiction. It carved out a niche in the common citizens' heart whose respect and adoration for the higher judiciary reached glorious heights.

Justice Krishna Iyer's prolific judgments, his gentle and disarming demeanour as a judge, his unrivalled grasp of facts and law, his empathy for the disadvantaged, and his courtesy and consideration for the young lawyer appearing before him was a unique blend of judicial virtues.

Justice Krishna Iyer's interim order of June 24, 1975 — a day before the Proclamation of Emergency on June 25, 1975 — in the *Indira Gandhi* case has a

historical significance. Mrs. Gandhi lost her election case and was disqualified. He did not give Mrs. Gandhi, the serving Prime Minister, an unconditional stay despite huge media hype. She was allowed to function as Prime Minister, attend the House, but without a right to vote following well-settled precedents.

H.M. Seervai, the great constitutional lawyer but no uncritical admirer of Justice Krishna Iyer, wrote: "As the historian turns from the High Courts to the Supreme Court his task will be harder, for the history of the Supreme Court during the Emergency is a history of two different periods: the first began a day before the Emergency and ended with Prime Minister Indira Gandhi's Appeal in the Election Case; the second began with the Habeas Corpus Case and ended with the revocation of the Emergency by a defeated Mrs. Gandhi, unwilling to put into the hands of her opponents a weapon she had forged and used against them. Of the first period, the historian will say that the Supreme Court moved towards its finest hour, a day before the Proclamation of Emergency, when, on 24 June 1975, Krishna Iyer J., following judicial precedents, rejected an application made by Mrs. Gandhi that the Allahabad High Court's order, finding her guilty of corrupt election practices and disqualifying her for 6 years, should be totally suspended. In the best traditions of the judiciary, Krishna Iyer J. granted a conditional stay of the Order under appeal, although he had been reminded by her eminent counsel, Mr. N.A. Palkhivala, "that the nation was solidly behind (her) as Prime Minister" and that "there were momentous consequences, disastrous to the country, if anything less than the total suspension of the Order under appeal were made"."

Justice Krishna Iyer earned the unintended, unforeseen and doubtful distinction of having judicially fathered the Emergency leading to preventive detention of many opposition leaders including Jayaprakash Narayan, Atal Bihari Vajpayee, L.K. Advani and Morarji Desai.

He recalls in his book *Off the Bench* how the then Law Minister H.R. Gokhale, a good friend, expressed a desire to meet him at his residence after Mrs Gandhi's disqualification by the Allahabad High Court judgment in connection with her appeal. He politely refused to see him and indicated that the correct way was to file the appeal in the Registry which would be taken up promptly.

After Retirement

Justice Krishna Iyer's crowning glory and finest hour were after retirement. He spurned the lure of pelf and power and governmental patronage and became an unrivalled champion of social justice, constitutional values and the rule of law. He blossomed into an iconic and inspirational figure both nationally and internationally.

The renowned Australian Judge Michael Kirby, a former President of the International Commission of Jurists, described him as "incontestably one of the great spirits of the common law of this century."

Justice Krishna Iyer's services to the nation, the rule of law, the judiciary and the disadvantaged and underprivileged give him a stature comparable to many who have been honoured with a Bharat Ratna. Many believe that his unique, lustrous and incomparable contributions earn him the sobriquet of Nyaya Ratna.

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A Voice for Probity in Public Life

Justice J.S. Verma released the first edition on 8th December, 2012 but unfortunately passed away on 22nd April, 2013. This article was published on 18th January, 2014 in the "Hindu@ on his 81st birth -anniversary. His perceptive Introduction to the first edition and his path breaking judgments have triggered many topics in this collection.

January 18, 2014, will be the late Chief Justice J.S. Verma's 81st birth anniversary. He passed away on April 22, 2013. Revisiting and recalling his achievements should inspire the younger generation of lawyers and citizens who did not have the privilege of knowing him.

Justice Verma strode across the judicial horizon for over 25 years with giant steps. He was appointed to the Madhya Pradesh High Court in 1972, became Chief Justice in 1986, was elevated to the Supreme Court in 1989, became Chief Justice of India in March 1997 and retired on January 18, 1998. Later he was appointed Chairperson, National Human Rights Commission. Every office he occupied was enhanced by his efforts.

It is the fortune of a lucky few to die at the summit of one's glory. Justice Verma's report after the brutal gang rape of "Nirbhaya", given in record time (December 23, 2012 — January 23, 2013) made him an iconic figure nationally and internationally. His celebrated judgment on sexual harassment in the workplace (Vishaka) was a huge leap forward in women's Human Rights jurisprudence. His judgment on judicial appointments and the Collegium system was path-breaking.

As 'amicus curiae' in the *Jain-Hawala* case (*Vineet Narain v. UOI*), I had the advantage of an insider's view. An invisible bond of shared values was fashioned between us. The Bench, (Justice Verma, Justice S.P. Bharucha and Justice S.C. Sen) stood up to the Executive and the political class as never before. The summoning of the Revenue Secretary, the CBI Director and the Director of Enforcement at each hearing in the Supreme Court and the monitoring of CBI investigations caught the imagination of the people.

It was a seminal case dealing with corruption and the criminality of powerful persons and the pressure from the Bench and the ongoing hearings led to the resignations of three Cabinet Ministers — V.C. Shukla, Balram Jakhar and Madhavrao Scindia, two Governors — Motilal Vora and Shiv Shankar and the Leader of the Opposition — L.K. Advani. Justice Verma quoted Lord Denning with approval. Lord Denning had observed that the Commissioner of Police — “like every constable in the land, [...] should be, and is, independent of the Executive. He is not subject to the orders of the Secretary of State, [...] no Minister of the Crown can tell him that he must, or must not [...] prosecute this man or that one. [He] is answerable to the law and to the law alone.”

He was a judicial warrior with a ‘lion heart’.

His crowning achievement as Chief Justice of India was the formulation of the Restatement of Judicial Values in 1997 — a voluntary code of conduct with ethical dimensions unanimously adopted by Supreme Court judges.

After retirement, he headed the National Human Rights Commission and his active interventions after the Godhra riots of 2002 reflected his commitment to minority rights. His personal visits to Gujarat and dynamic approach silenced international criticism and projected India’s enduring concern for minorities. He was a valued and sought-after speaker in many international conferences. He was invited by the Malaysian Bar, Lawasia, the International Bar Association and Transparency International to head the Panel of Eminent Persons to review the 1988 Judicial Crisis in Malaysia arising out of the removal of the Lord President Tun Salleh Abas and two senior Supreme Court judges Tan Sri Wan Suleiman and Datuk George Seah. The panel confined itself to the material available to the earlier tribunals and reported that the removals were not justified and unconstitutional and “non est”.

Embodiment of Integrity

He was one of our tallest judges who left his imprint on every field of adjudication. He was innovative, intelligent and indefatigable but above all he was the embodiment of integrity. Judicial power in his skilful hands became a rapier not a bludgeon. His finest hour was after retirement, when he eschewed private gain for public service — no juicy arbitrations, no ‘never-ending’ Commissions of Inquiry, and yet, he was generous in offering advice freely to the humble NGO or to Presidents and Prime Ministers. Justice Verma was a powerful voice for integrity and probity in public life; a voice heard with respect and often with fear by the erring judge, the dishonest public servant or the wily politician; a voice which reverberated throughout the length and breadth of India. Whenever human rights, the rule of law or the independence of the judiciary were imperilled, his prompt and forceful interventions protected Indian citizens.

He truly became the Peoples’ Tribune mirroring the Roman Tribune that protected the plebeians from the patricians.

“I maintain,” said Lord Macmillan, “that the ultimate justification of the law is to be found and can only be found in moral considerations”. He spoke as he

lived, following rigorous standards. Justice Jagdish Sharan Verma will always remain an inspirational moral influence in our judicial firmament, encapsulating character, courage and craftsmanship not unmixed with compassion — a priceless gift which we must cherish, preserve and enhance.

Cricket

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Not Cricket

This article on cricket match-fixing (in two parts) was published in The Statesman on 15 and 16 November 2000. It refers to the King Commission Report in South Africa after captain Hansie Cronje's confession. The CBI report implicated Mohammad Azharuddin as well as Dr. Ali Irani, Ajay Sharma and others.

I

(SOME BOUQUETS AND SEVERAL BRICKBATS)

On his 92nd birthday this year Sir Donald Bradman was described by Prime Minister John Howard as “the greatest living Australian”. He added “even now in a world scarcely recognizable to that in which he played, the name Bradman resonates with meaning - challenge, determination, commitment, fairplay and honour”.

Sadly, the year 2000 will be known for the King Commission report in South Africa, following Hansie Cronje's disclosures and confessions triggered by Delhi Police surveillance on cellular calls.

The CBI report is refreshing in part, alarming in part, depressing in part but sinister in many parts. It is a skillfully drawn report as a result of shrewd and selective investigation where many of the prominent players have been exposed but where the attention from many significant issues of great moment has been buried and sidelined.

Pre-World War II, cricket was a ‘Gentleman’s’ game. At the Lords there were separate gates from the pavilion for the ‘Gentlemen’ (amateurs) and the Players (the paid county professionals) to go on and off the field. And yet people and players did bet and gamble. But they gambled and bet to win and not to lose. They were proud of their country, their performance and their team and they believed in what cricket is all about, fair-play and sportsmanship, openness and a vigorous contest with a little horse-play thrown in. And yet a little gamesmanship was always permitted.

MAFIA LINK

It was believed that the venerable Dr. W.G. Grace rarely lost a toss when the opposing Captain spun the coin. W.G.'s call was always muffled and incomprehensible to the opposing Captain until ‘W.G’ in a stentorian voice declared “I win”. Slowly the game has changed. There is too much money

involved - - money for the player, control of immense funds and perks for the cricket administrator, large and remunerative contracts for TV and electronic media rights with the customary kick-backs, endorsements, ads and what not.

And we as a nation have been gullible and trusting. We have turned a collective blind eye to significant events - the government, the politician and the public. "We see no evil, we speak no evil, we hear no evil" Why should we? It was such a cozy arrangement yielding huge perks, high publicity, global trips, royal hospitality, patronage and may be some hidden and undisclosed rewards. Deliberately, this attitude and propaganda was sought to be legitimised by using the fig-leaf of the Chandrachud Report and basking in the lustre which a former Chief Justice's name carries in India. But the Delhi Police spoiled all the fun and the foolish Hansie Cronje spilled the beans.

First, the refreshing parts and bouquets for the CBI. The admissions and self-inculpatory statements, a gist of which is given in the CBI report, are a tribute to the investigating agency. If the statements have been correctly recorded (and I hope they are on audio and video tapes), a vast net-work of bookie gambling and fixing has been admitted by some of the principal players who could influence the match.

Azharuddin a long serving captain, Dr. Ali Irani, Ajay Sharma stand fully exposed with the admissions they have made. Ajay Jadeja and Manoj Prabhakar appear to have well established connections in the bookie world as revealed by the cell-phone calls and their own admissions. Nayan Mongia, who has now denied any involvement, seems to be the victim of uncorroborated suspicion mainly based on one incident while Nikhil Chopra does not appear to have had a fair deal, there being very little against him revealed in the report. The fact that CBI cleverly confronted these players with the statements already made by the bookies made it impossible for some of these players to pretend ignorance and innocence. Well done CBI !

The alarming part of the CBI reports states "during the inquiry it was learned that the lure of easy money has gradually attracted the underworld into this racket. It seems that it is only a matter of time before major organized gangs take direct control of this racket, a phenomenon that would have implications not only for cricket but for national security as a whole".

LACUNAE

The report goes on to say that betting on cricket in India is perhaps the biggest organized racket in terms of monetary turnover and volume of transactions and betting on a One-day International in any part of the world on a rough estimate runs into hundreds of crores and the underworld mafia is increasingly taking control. In the past gold smuggling activities diverted considerable money to the smugglers which ultimately financed 'Bollywood' films and later real estate. The criminal-bureaucratic-political nexus, partly the offspring of large scale smuggling, directly facilitated the Bombay serial blasts. The N.N. Vohra (the then Home Secretary) Committee report shows how this nexus works and yet the Government, the politician and the legislator is wholly unconcerned and no vigorous and effective measures have been taken in spite of directions of the Supreme Court in the Jain -Hawala judgement.

The depressing part of the report is that many reputations have been tarnished on the uncorroborated say-so of self-confessed bookies and fixers. Diverse names of foreign players have been bandied about and given wide publicity like Aravinda D'silva, Arjuna Ranatunga, Martin Crowe, Alec Stewart, Brian Lara and some other, heroes in the world of cricket and in their own countries. No attempt appears to be documented in the report to match and corroborate when, how, to whom and where the payments were made. There are no specifics, no corroboration, no effort to check from the audio-video tapes of the match whether there was under-performance.

This considerably detracts from the fairness, impartiality and objectivity of the report. It destroys reputations on unverified statements of dubious individuals. This portion of the report not only shows total lack of sensitivity but may well turn into a tragic farce. Unless it is a shrewd and calculated strategy to divert attention and diffuse the blame from Indian Cricket alone.

CLEAN CHIT

Now for the sinister part and some more brickbats. Even though the parameters of the report included the examination role and function of BCCI so as to evaluate whether it could have prevented the alleged mal-practices, there is very little effort – to intensively examine and confront high officials of BCCI by taking instances of matches which appeared to be fixed. There was so much material in the Print Media and in the Pakistan inquiries and I am sure in the match videos. There is no attempt to incisively question or interrogate the BCCI officials as to their connections with the Bombay racecourse and bookies which according to the CBI report are the group of bookies who have started the massive cricket-betting racket.

In July this year reports appeared of simultaneous IT raids called 'Operation Gentleman' where betting registers, betting diaries and records, names of punters and large undisclosed wealth were reported in the National Press as sourced from IT and CBI officers cooperating in the searches. No exercise of a well-coordinated interrogation in this direction appears to have been made before this interim report and yet clean chits have been liberally given.

II

THE BEGINNING OF A COVER-UP

The mystery deepens and the sinister and depressing feeling is heightened when CBI has in Section IV mentioned the legal position and disclosed in detail confidential advice given to it by its legal advisers. It is unheard of that a client reveals confidential advice in a private document routinely never disclosed even before the preliminary inquiry is over which is directly subversive of the public interest. Is it not a deliberate pucca guarantee to the persons concerned that there is no question of dragging them to a criminal trial? Has the whole enquiry been planned to make a public relations exercise to condemn a few players and bookies and allow the big fish to escape?

Statements recorded by the Police cannot be used in a prosecution except by the accused for contradicting the witness. If at all, the recorded statements, (if not denied because of the audio/video tape) may enable the cricket administrator to take appropriate action. But nothing more.

AMNESTY

My future apprehensions about the big fish escaping is heightened by the strong adverse general remarks made in Section V of the functioning of the BCCI more appropriate for an academic seminar than a precise detailed incisive interrogation and enquiry by the top investigative agency. In this connection some dates and events are worth noting. The IT raids surfaced in the national media as 'Operation Gentleman' on 21-7-2000. The Minister of State Dhindsa declared his intention of giving amnesty to all players if they speak the truth as reported in the National Press on 27 July 2000. And this immediately after a report of the I.T catch of betting sheets, betting diaries seized from bookies and players with considerable political clout. There are early warnings tucked away in the report which suggest the beginning of a cover-up. Look at this gem: "CBI inquiry into the affairs of BCCI has not disclosed any direct evidence of nexus of any past or present office bearers of BCCI with the betting syndicate". But what about circumstantial evidence? What about the racecourse bookie and the habitual punter?

CBI's record in covering up and not disturbing politically and financially influential individuals is unrivalled. Many of them have occupied high positions in the BCCI in the past, if not in the present. The Joint Parliamentary Committee investigating the Banking Securities Scam that broke a few years ago on the Bombay Stock Exchange has made this comment on the CBI : "The Committee regret to note that the CBI has taken a long time to register a P.E against suspected individual/officials. They would urge upon them to expedite the investigation in this regard and launch prosecution against those found guilty including the higher-ups in the decision making process. " "The Committee are also unhappy that the CBI have failed to investigate the connection that the brokers had with various politically important persons and report the result to the Committee".

The Delhi High Court while monitoring the JMM Bribery Case queried the CBI as to why it had not included the name of the former Prime Minister Narasimha Rao amongst those charged. In that connection the Court remarked: "It is the paramount duty of a police officer to whom the commission of a cognizable offence is reported, to register a case and promptly commence investigation without perverting or subverting the law. That does not appear to have been done in the present case since what has been registered does not contain anything of significance from the information contained in the complaint dated 1st February, 1996." ... "We are constrained to observe that the manner in which the Court was told about the registration of the case was clearly an attempt to mislead and over-reach this court."

RECORD

Ultimately the court directed the CBI to forthwith register a regular case. The intervention of the court has now led to the conviction by the trial court of a former Prime Minister P.V. Narsimha Rao, which is now under appeal. In the Jain Hawala case the CBI's investigation was deliberately designed to assist the accused and the Supreme Court was forced to remark in its judgement: "these

facts are sufficient to indicate that either the investigation or the prosecution or both were lacking.”

These are all matters of record. It is curious that though it appeared prominently in the national press that a former distinguished Revenue Secretary Mr. Sivaraman had sent DRI tapes in 1995 to the then President of BCCI, Madhavrao Scindia, no attempt appears to have been made to record the version of Mr. Sivaraman. A very significant omission. Are these early warning signals of the beginning of a cover-up?

Is there a way forward? What is the way to go? The swiftest remedy appears to be a drastic legislative intervention by an Ordinance setting up a high powered panel/special commission. The panel should be supported by a special team of officers drawn from CBI, Income Tax, FERA and other concerned Police authorities as well as assessors experienced and un-tainted senior cricketers who can assist in the analysis of the videos of the suspect matches.

Under the constitution there can be no retrospective penalties imposed for past activities. This is a fundamental right. But the new law can provide, first, creation of new offences of non-disclosure on oath before the panel, not co-operating in giving information to the panel, for perjury and falsification of documentation required by the panel. The panel would have all powers for summoning and recording evidence on oath. Additionally the powers of the investigative team may also be enlarged to approximate them with what is already on the statute book under Income Tax, Central Excise and Customs.

TRUTH

These officers are entitled to record and have statements signed which can be used as evidence for offences under the respective statute. A similar power to the special investigating team would make such statements admissible when examination takes place before the panel. The objective of the panel would be to ascertain the truth, expose the betting cartels and get all the facts. The facts are required to be ascertained to enable the Parliament to come out with further drastic legislation to control gambling and betting syndicates cartels and operations which the CBI report indicates may directly fall under the control of the underworld and endanger national security.

If properly structured and manned the Panel can get quick decisive findings as was achieved in the Mundhra Commission presided over by Chief Justice Chagla. A dynamic individual of impeccable integrity and cricket-savvy to head such a panel is a must. All the skeletons will tumble out from the various cupboards. The immediate responsibility for action solely lies with the government and the legislator.

But will the powers that be act against vested interests where everything can be subverted by money power and political connections and the stakes run as high as hundreds of crores in each ODI? The citizens' best hope is a free and dynamic media, a constitutional right and gift which we proudly enjoy. The young enthusiastic fearless band of young investigative journalists supported by independent editors alone can build up pressures that can do India proud.

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The Sydney Test — Will it Revive Fairness

This article was published in the Hindu on 15 January 2008 after the controversy in the Sydney Test between Australia and India. It refers to the tactics of 'mental disintegration' and sledging by the Australians, the ban on Harbhajan Singh by match referee Mike Procter and a comment on the same. After the article was written an appeal was carried to a New Zealand judge in appeal under the ICC Code of Conduct for Players and Team Officials and Harbhajan Singh was exonerated.

The Sydney Test is a milestone in cricket history. It has spawned many issues and raised innumerable questions of reforms in the International Cricket Council rules. Peter Roebuck's felicitous phrase "a pack of wild dogs" will forever remain in collective cricket memory. In India, it has already achieved 'Vedic status.'

The Sydney imbroglio revives memories of the bodyline controversy of 1932-33 during the Ashes Series in Australia. Its condemnation was best expressed by Walter Hammond, a member of Douglas Jardine's English team and later captain of England, "I condemn it absolutely. Bodyline is dangerous. I have had to face it, and I would have got out of the game if it had been allowed to persist."

Bodyline cricket targeted a batsman physically. Currently, the Australian philosophy as now supported by James Sutherland (Cricket Australia) is to attack the opponents' minds and achieve 'mental disintegration'. If bodyline is banned because it is a dangerous physical threat why are tactics of 'mental disintegration' not.

But let me first congratulate a large segment of the Australian media and sportspersons which has vigorously criticised its own team. Australia is a cricket-loving nation and so is India. The two countries are vibrant democracies with a shared vision and cherished values of freedom of speech and media, the rule of law and a passion for fairness and equality.

I have, as Lawasia president, interacted with the Australian legal fraternity — judges and lawyers. They have nurtured and preserved an independent and fearless legal system based on fairness. Recently, Indian doctor Mohammed

Haneef's visa was cancelled as a consequence of his suspected links with abortive terror attacks in London and Glasgow. The efforts of barristers Peter Russo and Stephen Keim were highly appreciated in India.

For many cricket-lovers in India, Don Bradman is still considered *numero uno*, surpassing W.G. Grace, Ranji, and our own Sachin Tendulkar. Bradman in his *Farewell to Cricket* narrates how the bodyline controversy was given a quietus by the MCC ruling that any form of bowling which is obviously a direct attack by the bowler on the batsmen would be an offence against the spirit of the game and was therefore unfair. Bradman mentions the comment of Sir Pelham Warner in 1932 even before the bodyline controversy arose in an English cricket match — "Bowes must alter his tactics. Bowes bowled with five men on the on-side and sent down several very short-pitched balls which repeatedly bounced head-high and more. Now that is not bowling, indeed it is not cricket."

The ICC must seriously consider the whole philosophy and tactics of 'mental disintegration' and 'sledging' raised to the level of a science by Cricket Australia. A deliberate, well-planned, intensely rehearsed and fine-tuned campaign with the assistance of expert psychologists including media blitz and abusive on-field verbal 'sledging'. 'Sledging' literally means hitting with a heavy blacksmith hammer. Cricket is all about 'fairness,' and 'fair' means honest, just and straight-forward.

Steve Waugh refers to an article by John Thicknesse in 1994 in *Wisden* which said "Border (Allan) will be remembered in England with respect than affection stemmed from his condoning not infrequently his participation in the sledging of opponents and umpires during play in open violation of ICC's Code of Conduct." Waugh continues "Direct abuse to me is sledging — and should never be allowed ... Occasionally abuse did arise, and it was an area we needed to clean up as we were aware kids were copying our every move and such an example was not the one we wanted to set." Waugh's plea has fallen on deaf years. James Sutherland is in a belligerent, combative and unrepentant mood. He has ridiculed India and said that test cricket is not "tiddly winks" and that Australia played hard and fair and will continue to do so.

Guha Ray quotes Tony Greig on 'sledging' by Australians in a speech in Johannesburg (Tehelka, January 19, 2008) — "I have never heard anything like it. The whole thing is getting out of hand and the time has seriously come for the authorities in the game to rethink the question of what players are allowed to say on the field."

What is the way forward? In the short term, Australian Prime Minister Kevin Rudd's advice "to settle the matter at the first available opportunity" and Foreign Minister Stephen Smith's wise words — it is time for "cool heads" — should be accepted.

But the BCCI should not lower its guard. The text, content and full reasons of Mike Procter's order banning Harbhajan Singh were on the website of neither the ICC nor the BCCI when this article was written. Nor is the verbatim order available with the media. Why this lack of transparency? Surely, the Indian public is entitled to know.

With difficulty, a full copy was made available to me by a generous source. The charge was Harbhajan calling Andrew Symonds a 'monkey.'

A few important portions of the reasons given by Procter are extracted:

"The first issue for me is, did Harbhajan Singh say the word 'monkey' or 'big monkey'? I have heard evidence from Andrew Symonds, Michael Clarke and Matthew Hayden that he did say these words. Harbhajan denies saying these words. Both umpires did not hear, nor did Ricky Ponting or Sachin Tendulkar. I am satisfied and sure beyond reasonable doubt that Harbhajan Singh did say these words."

"I am satisfied that the words were said and that the complaint to the umpires which forms this charge would not have been put forward falsely. I dismiss any suggestion of motive or malice".

"Whatever may have been said between them prior to Harbhajan Singh calling Andrew Symonds a monkey is irrelevant. There is history between these two players."

He finds that Tendulkar and the umpires were not in a position to hear the words. He took into account a joint statement issued after the Mumbai incident by the Indian and Australian Boards regarding the rest as irrelevant.

The order has many glaring infirmities.

First, the finding is not clear as to whether what Harbhajan said was 'monkey' or 'big monkey.' Obviously there is a discrepancy in the evidence. The charge mentioned only 'monkey.' Secondly, Australian witnesses were all present at the same time. Evidence should have been taken singly and other witnesses kept out. Thirdly, no reasons are given; only conclusions mentioned. Particularly, the observation "this charge would not have been put forward falsely" — and the unreasoned dismissal of the suggestion of "motive and malice." The dishonest behaviour of Ponting and Clarke was seen in live television coverage. They repeatedly appealed though the catches were grounded. Harbhajan's batting on that day had frustrated the Australians. Ponting has repeatedly been dismissed by Harbhajan and is now Harbhajan's 'bunny.'

Fourthly, the prior events and conversation between Symonds and Harbhajan — the most relevant fact — is rejected as irrelevant. Harbhajan had patted Brett Lee who never protested nor complained nor came as a witness. Symonds officiously intervened even though "there is history between these two players" and as admitted by him in the Press "he had a go at him" and "took a crack at Harbhajan." Symonds was then 'gagged' by Cricket Australia. Obviously, there was provocative 'sledding' — why was it irrelevant? Apparently, a well-planned provocation, leading to a false complaint to remove a thorn from the Australian side. A classic attempt to achieve 'mental disintegration'. Facts sufficient to raise a reasonable doubt were ignored. Mike Procter's error, if not bias, is apparent. Fifthly, the BCCI needs to look carefully at the article written by Avirook Sen (*Hindustan Times*, Jan. 9, 2008) about the biases, views and opinions of Mike Procter during the 'Apartheid' days. He reportedly characterised India's stand against the ban on South African cricket as hypocritical.

In the long term, there is the wider question of fairness and preserving the spirit of the game. Rules have to be modified. Some forms of abuse may be terms of endearment in Australia but in the playing fields of India, they would provoke fisticuffs and even a minor riot. Planned, systematic, expert-supported attack by verbal jousts and other tactics to 'mentally disintegrate' the opposition is subversive of the spirit of the game. It must be banned. Further technology must be utilised widely with the players' right to appeal. Seven out of the eight horrible decisions in the Sydney Test could have been avoided.

If Cricket Australia wants a fight and no change in the rules, the Australian 'dingo' will have to be reined in by the 'British lion' and the 'three Asian tigers.'

Finally, I salute the Australian media and its great sportspersons for their forthright criticism while 'pointing' an accusing finger at James Sutherland, the face of the "Ugly Australians."

Sundry Reflections

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Musings and Experiences

This article was published in the LAWASIA 40th Anniversary Volume published in 2006. It deals with the author's interaction with LAWASIA as Councillor and later as President (1991-93).

When Lawasia celebrates its 40th Anniversary, it is important to recall the prophetic vision of the late Mr. Justice John Kerr which has borne fruit. He said at the opening session at Canberra:

"It seems to be a necessary condition of effective regional activity that within a region there should be developing internal communications, exchange of ideas, trade, and above all an abandonment of national isolation."

The region covered by Lawasia is rich in linguistic, religious, ethnic and historical diversity. A variety of cultures, different languages, literature, dress, cuisine, are unparalleled in the world.

My close association with Lawasia commenced as a Councillor in mid-eighties and culminated in my Presidency during 1991-1993.

What is the most significant contribution of Lawasia?

It is Lawasia's commitment to the rule of law in the region and its support to human rights based on the bedrock of independence of the judiciary. During several crises and tense situations in the region Lawasia's support and criticism have had a sobering, calming and restraining influence. In these days of mass and instant communications, governments are very sensitive and receptive to international criticism on issues of violation of human rights and subversion of the independence of the judiciary leading to undermining of the rule of law.

Biennial conferences

On my election as President I wrote in 1991 about Lawasia Biennial conferences:

"The LAWASIA biennial conferences are an endless source of self-education and delight. They have taught us that the Bangkok taxi driver is an adept practitioner of "*laissez faire*" (he can easily charge five or six times the normal fare to the unwary visitor) and he lives up to the Latin maxim "*caveat emptor*" (buyer/customer beware); that in many Asian countries staunch Buddhists, including the clergy, would be horrified if

they were confined to a vegetarian diet (a revelation for an Indian); that Indonesia's Muslims still use highly Sanskritised names, like "Premavati" (a lovable lady) or "Vidyavati" (a learned lady) or "Garuda" (an eagle); that Australian cheese is not permitted by customs to be carried to New Zealand and *vice versa*; that Malaysia is the only country where, under the Constitution, Kingship goes by rotation to the person elected by the Council of Kings; that in many parts of India (including courts) the word 'lawyer' is pronounced as "liar".

Papua New Guinea (PNG): Leadership Tribunal

An innovative accountability mechanism in PNG has left a lasting impression on my mind. In March, 1992 a legal education workshop was organized at Port Moresby by Chris Roper and Cyrus Das hosted by the PNG Law Society. The newspapers were full of findings of misconduct made by "The Leadership Tribunal" against the serving Minister for Labour and Employment. He promptly resigned.

The PNG constitution has a unique provision to control high powered dignitaries and leaders. In PNG, a leader out of respect is called "The Big Man". The Leadership Code covered Ministers, Bureaucrats, even Judges and High Public Officials. In the first instance the Ombudsman Commission – a constitutional authority – would examine allegations of misconduct. If convinced it would refer matters to the Public Prosecutor who would institute proceedings before the "Leadership Tribunal". The Tribunal has no punitive powers but makes findings on the basis of a flexible and fair procedure. The standard of proof was not the high one required in criminal cases nor a mere balance of probabilities as in civil matters. It was linked to the gravity of the allegations. A finding of the "Leadership Tribunal" did not lead to disqualification or punishment but if the erring "Big Man" continued in office he would run the risk of further proceedings. Normally the "Big Man" resigns to avoid further proceedings - a salutary effect of public disapprobation and a good constitutional safety valve. It was a unique mechanism and was working successfully to ensure transparency and accountability.

I wrote in the President's page:

"I congratulate the citizens, lawyers and judges of Papua New Guinea for they deserve to be ranked as "the Big Men" in the Lawasia Region, as champions of the democratic process. Though small in size and population, Papua New Guinea stands tall among the countries of the Lawasia region."

I am not aware whether after 14 years the same constitutional mechanism is still available in PNG and how far it has succeeded.

Fiji Lawyers Amend the Indian Constitution

In July-August, 1993, the Fiji Law Society held a convention after many years. In the inter-regnum the first 'coup' had claimed many victims including Kishore Govind, a sitting High Court Judge (and a prominent member of Lawasia). He had to leave Fiji and take refuge in Australia. Happily he is now back in Fiji as a member of the High Court where his heart always truly belonged.

For the Fiji convention I had written a paper on Judicial Review under the Indian Constitution and I quoted Article 21 which reads:

“No person shall be deprived of *his life or personal liberty* except according to procedure established by law.” (emphasis added)

Overnight the Fiji Law Society came out with a print of my article and reproduced Article 21 somewhat differently reading:

“No person shall be deprived of *his wife* or personal liberty except according to procedure established by law:

This would have gone unnoticed but for my intervention. I complimented the Fiji Law Society for amending the Indian Constitution in record time but warned them against creating gender discrimination.

This caused great merriment. G.P. Lala, the organizer of the convention was quick to respond that Indian wives may be grateful for the Fiji amendment.

I am sure over the years Lawasia’s enormous and immeasurable influence will be instrumental in increasing the spread and strength of democratic norms of transparency and accountability while invigorating political and civil rights.

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Hindu Law and its Influence on Indian Law – Developments Since Independence

This speech was delivered at a conference on 'World Religions and their Influence on Legal Systems' organized by the Chamber of Lawyers at Frankfurt am Main, Germany between 29 – 31 October 2009. It deals with personal laws prevalent in India for Hindus, Muslims, Christians and Zoroastrians. The Hindu Code consisting of three statutes radically reformed Hindu Law. The controversy between the President of India, Rajendra Prasad and Prime Minister Nehru on the Hindu Code Bill is mentioned.

INTRODUCTION

Any presentation on Hindu Law, particularly in Germany, cannot be made without reference to Friedrich Max Müller [1823-1900], whose great work in the study of Sanskrit and Indology and his contribution in the publication of the "SACRED BOOKS OF THE EAST" is unparalleled. He made a deep study of the 'Vedas' – the source of Hindu law, using old manuscripts available in England and Europe. He believed that a "Reformation" within Hinduism is needed comparable to the "Christian Reformation".

Max Müller would have been a happy man when the Hindu Code, in the form described by me in detail hereafter, was adopted by the Indian Parliament in the 1950s.

He was impressed by Ramakrishna Paramhansa and his great disciple Swami Vivekananda who was the inspiration behind the establishment of the Vedanta Society of New York.

The Goethe Institutes in New Delhi (of the Federal Republic of Germany) to commemorate Johan Wolfgang Goethe has been housed in the building now called "Max Müller Bhavan" in honour of this great Indologist and Sanskrit scholar.

1. The Indian Nation Today

- 1.1 The Indian Nation is now governed as a Constitutional Republic. On 26th January 1950, the Republic was born and the Constitution came into force. India has no State Religion and is a secular state protecting and preserving all religions. It is not a theocratic State. Under the Chapter on Fundamental Rights, Freedom of Conscience and Religion are protected. There are many other Fundamental Rights protecting the Freedom of Speech and Expression, Equality, Non-discrimination and Minority and Cultural rights.
- 1.2 India's population is over 1 billion (1000 million). Hindus are about 85% (850 million), Muslims about 11% (110 million) – (which is the second largest Muslim population next only to Indonesia), Christians about 2% (20 million) which includes principally Roman Catholics and there are other smaller religious groups like Sikhs, Jains, Buddhists, Zoroastrians (Parsis) and now recent converts to Buddhism, called Neo-Buddhists.
- 1.3 There are 22 major languages mentioned in the Constitution – having different scripts, different literatures and concentrated in different territories. India being a federation, the States which constitute the Union are mainly formed on linguistic lines. If one sees the Indian currency note, the national language, Hindi, and the link language English are mentioned prominently while in the margin denominations of the currency are mentioned in different scripts. Each language group is well over 25 to 30 million. India is a mini-Europe – it has no single language like USA, Russia, Germany, France, Spain, Brazil etc.
- 1.4 Some of the great religious monuments in India are - the Golden Temple of the Sikhs in Amritsar, the Dargah of the great 'Sufi' Saint Moinnudin Chisti in Ajmer, Jama Masjid in Delhi, the Meenakshi Shiva temple in Madurai, the Sun Temple in Konarak, the Balaji Temple in Tirupati, the famous Catholic Church of St. Francis in Goa (1521 A.D.), and a thousand year-old Jewish Synagogue in Cochin (now Kochi). Many of the Hindu temples in the North were destroyed during the Islamic onslaught but most of them have survived in the South. The Jain temples of Dilwara and Ranakpur are world famous.
- 1.5 The great Emperor Akbar did not have a son and the story runs that with a view to get the blessings of Moinnuddin Chisti in Ajmer he went on foot from Agra to Ajmer and consequently earned the boon of a son-Jehangir. There are a large number of Christian churches all over India but there is a concentration in South India and particularly in Goa (which was Portuguese territory till 1961) and Kerala. Many of the tribes in the North-East have also been converted to Christianity. There is also a small community of Syrian Christians concentrated in Kerala who owe allegiance not to the Vatican (the Pope) but to the Patriarch of Antioch (Damascus).

- 1.6 All these religions have had enormous influence not only on the social and cultural life of the Indian people but have significantly influenced the law.

2. Pre-history – Indus Valley Civilization – Indo-Aryans

- 2.1 The remains of the Indus Valley Civilization were discovered in about 1920 — Mohen-jo-daro in Sind and Harappa in the Western Punjab (now in Pakistan). They are the earliest remnants of the past, beyond the mighty river Indus (Sindhu). This civilization is now dated as being well before the migrations of the Indo-Aryan people from the North-West. By all authorities, it was a highly developed civilization with millenniums of human development behind it. Some authorities believe that the inhabitants may have some racial characteristics similar to the Dravidian population in Southern India. The excavations at these sites show layers and layers of ruins and well developed roads, public baths and temples, buildings and drainage systems. Nehru in his book mentions the views of Sir John Marshall responsible for the excavation relating to the Indus Valley Civilization as:—

“nor would it be possible until the classic age of Greece to match the exquisitely supple modelling of the two human statuettes from Harappa...”¹

- 2.2 The Indian subcontinent has faced waves of many migrations and peoples crossing the Indus and either invading India or settling down in the fertile Indo-Gangetic plains.
- 2.3 The first such major migration belonged to peoples who shared the Indo-European languages. Indo-European languages include Albanian, Anatolian, Armenian, Balto-Slavic, Celtic, Germanic, Hellenic, Indo-Iranian, Italic and in India it developed into the highly scientific Sanskrit language - the language of the “*Vedas*”, the prime source of “*Dharma*” - a word with multiple meanings. It may mean righteousness or right conduct or duty or law or religion. Sanskrit was also the language of the “*Puranas*” and the language of “*Dharmashastras*”.
- 2.4 The Indo-Aryan peoples had a commonality of languages and also had similar racial characteristics. They were Caucasian, taller and fairer as compared to the indigenous inhabitants. For instance the word ‘*Pitru*’ (Sanskrit) (father) is very similar to ‘*Pater*’ (Latin) and which has become ‘father’ (English). Similarly, the word ‘*Matru*’ (mother) is ‘*Mater*’ in Latin and has become ‘mother’ in English.

3. What is Hinduism?

- 3.1 The word ‘Hindu’ and ‘Hinduism’ are closely related to the great river Indus or ‘Sindhu’ (in Sanskrit) (Latin, ‘Indus’, ‘Greek’, ‘Indos’). Those who lived beyond this great river were called ‘Hindus’.

3.2 Jawaharlal Nehru writes²:—

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1. Jawaharlal Nehru: *The Discovery of India* (2004) p. 66.
 2. Jawaharlal Nehru: *The Discovery of India* (2004) p. 69.

"The first great cultural synthesis and fusion took place between the incoming Aryans and the Dravidians, – Out of this synthesis and fusion grew the Indian races and the basic Indian culture, – In the ages that followed there came many other races, Iranians, Greeks, Parthians, Bactrians, Scythians, Huns, Turks (before Islam), early Christians, Jews, Zoroastrians; they came, made a difference and were absorbed. India was according to Dodwell, 'infinitely absorbent like an ocean' ".....

"The foreigners (Muslim Turks)", says Vincent Smith "like their forerunners – [the Sakas and the Yueh-chi], universally yielded to the wonderful assimilative power of Hinduism and rapidly became Hinduised'."

3.3 The Hindu religion is not based on a single holy book like the Bible of the Christians or the Koran of the Muslims or the Torah of the Jews or the Granthasahib of the Sikhs. There is no single revelation from God as found in these holy books. In other words Hindus, Buddhists etc., are not governed by a single book (Kitab), they are "non-kitabias".

3.4 The Celebrated historian, Romila Thapar³ writes:—

"Hinduism was not founded by a historical personage as a result of a revelation: it is not a revealed religion but grew and evolved from a variety of cults and beliefs, of which some had their foundations in Vedic religion, and others were popular cults which became associated with the more sophisticated religion, a concession which the priests had to make to popular worship.....".....

"Another characteristic of Hinduism was a gradual shift in emphasis from ritual alone to the view that a completely personal relationship between God, and the devotee was possible. The monotheistic concept of God, with either Vishnu or Shiva as its manifestation, was gaining strength. The relationship was one where God could bestow his grace (prasada) on the devotee, varied from person to person. This idea of personal devotion or bhakti, as it was commonly called, was to become the dynamic force of later Hinduism."

3.5 Jawaharlal Nehru⁴ narrates:—

"Hinduism, as a faith, is vague, amorphous, many-sided, all things to all men. It is hardly possible to define it, or indeed to say definitely whether it is a religion or not, in the usual sense of the word. In its present form, and even in the past, it embraces many beliefs and practices, from the highest to the lowest, often opposed to or contradicting each other. Its essential spirit seems to be to live and let live."

3.6 Nehru further narrates the views of Mahatma Gandhi⁵:

"Mahatma Gandhi has attempted to define it: If I were asked to define the Hindu creed, I should simply say: Search after truth through non-

3. Romila Thapar: *History of India-1* (1986) pp. 132-133.

4. Jawaharlal Nehru: *The Discovery of India* (2004) p. 71.

5. Jawaharlal Nehru: *The Discovery of India* (2004) p. 71.

violent means. A man may not believe in God and still call himself a Hindu. Hinduism is a relentless pursuit after truth ... Hinduism is the religion of truth. Truth is God. Denial of God we have known. Denial of truth we have not known.'

3.7 Nehru continues:⁶

"Truth and non-violence, so says Gandhi: but many eminent and undoubted Hindus say that non-violence, as Gandhi understands it, is no essential part of the Hindu creed. We thus have truth left by itself as the distinguishing mark of Hinduism. That, of course, is no definition at all."

4. Several Personal Laws in India

4.1 Religion has played a dominant role in the development of the Hindu Law as well as various laws in India. We have separate personal laws for Hindus, Muslims and Christians apart from a special enactment for Zoroastrian Parsis.

4.2 Hindu Law

The predominant law in India was "Hindu law" which governed marriage, adoption and inheritance. Statutory reforms were adopted during British Rule like banning of "*Sati*", permitting widow remarriages and prohibiting child marriage. Indian reform movements also led to the enactment of the Hindu Women's Right to Property Act, 1937. After independence the Hindu Marriage Act, the Hindu Adoptions and Maintenance Act and the Hindu Succession Act were enacted – sometimes referred to as the "Hindu Code"—the effect of which was to modernize and rejuvenate Hindu Law.

4.3 Muslim Law

Similarly Indian students of law would have to study the law governing Muslims, particularly the law relating to marriage and divorce and the law of Succession and Inheritance. There are two main schools – Sunnis and Shias and Sunnis are in a majority in India.

4.4 Christian

The Christian Marriage and Divorce are governed by the Indian Divorce Act, 1869 and Succession is governed by the Indian Succession Act. There is also a Special Marriage Act, 1950 for any citizen of India who wants to have a civil marriage.

4.5 Zoroastrian - Parsis

There is a small community of Zoroastrians (Parsis from Persia) numbering about two hundred thousand. They are a very highly educated and influential community who migrated from Iran after the advent of militant Islam which was intolerant of other faiths.

The legend runs that some Zoroastrians (in about 10th Century A.D.) who are called 'Parsis' came by the sea route and landed on the West Coast of India in the State of Gujarat and they appealed to the King to give

6. Jawaharlal Nehru: *The Discovery of India* (2004) p. 71.

them refuge. The territory was governed by the small Kingdom of 'Sanjan'. The language being different there was no oral way to communicate. The Sanjan King sent his emissary with a bowl full of milk signalling that there was no place for them in his kingdom. The leader of the 'Parsis' being a shrewd and intelligent individual put a spoon of sugar in the milk and sent the messenger back signalling that they will add sweetness to the populace without disturbing them in any way. The Prince appreciated their intelligence and ready wit and gave them permission to settle down on condition that they will adopt the local customs and language and will not convert people to their religion.

- 4.6 Thus India has a very long tradition of tolerance and inclusiveness permitting all religions to function in a multireligious, multicultural and multi-lingual society.

5. Hindu Religion – Hindu Law – its Origin, Sources and Principles.

- 5.1 The prime sources of classical Hindu law are the "*Shrutis*" (*Vedas*) - that which is heard, the "*Smritis*" - that which is remembered and Customs and usages.

5.2 '*Shrutis*' – the *Vedas*

The sources of classical Hindu Law were originally the "*Shrutis*" i.e., the *Vedas* (as heard).

The four *Vedas* were *Rigveda*, *Yajurveda*, *Samaveda* and the *Atharvaveda* and the *Upanishads* (containing spiritual and philosophical distillation of the wisdom of the *Vedas*) which were 18 in number.

5.3 *Smritis*

The "*Smritis*" were several in number but the most dominant over a period of centuries became the "*Manusmriti*" or also called Manu "*Dharma Shashtra*" compiled (it is said) somewhere between 200 B.C. and 200 A.D. The '*Smritis*' were an attempt to collect and codify the rules of 'Dharma'. 'Dharma' has multiple meanings and has a flexible connotation viz., rightful conduct or duty or law or religion. The *Manusmriti* is regarded as the oldest and largest code and Manu is regarded as the pre-eminent law giver.⁷

5.4 "*Mitakshara*", "*Dayabhaga*" and Sub-Schools

Looking to the vast sub-continental spread of the nation, the Hindu Law subsequently was divided in several schools with different customs. The two most prominent schools were the "*Mitakshara*" and the "*Dayabhaga*" School - latter prevailed in Bengal and *Mitakshara* in other parts of India. The difference between the two schools is mainly in the law of inheritance and joint family property. There are several other sub-schools with differences depending on the customs in various parts of India.

- 5.5 Apart from these two main schools there are also sub schools of "*Mitakshara*" which evolved on the basis of various commentaries on the "*Mitakshara*" as prevalent in different parts of India.

7. Rama Jois: *Legal and Constitutional History of India* (2008) p. 27.

5.6 In addition, in the West Coast of South India various customs and usages were absorbed and received judicial recognition. These schools are known as *Marumakkattayam*⁸ and *Aliyasantana* and *Nambudri* systems. The principal and common feature of these three systems is that it is based on inheritance through the mother and the daughter - a matrilineal system of inheritance.

5.7 Ancestral Worship – Consequences on Inheritance, Adoption, Marriage

5.8 Inheritance

The influence of the Hindu religion on the law was because of the belief in ancestral worship (offering of rice balls - '*pindas*' to ancestral spirits) which could be performed only by a male descendant. Thus the son, the son's son and the son's son's son had the right to offer and worship ancestral spirits. This concept affected the law of inheritance, the law of adoption and the law of marriage. Inheritance would go to the male descendants. The concept of joint family property developed and that which was inherited from a male ancestor would be the joint family property of all the male descendants. Thus, if a Hindu dies intestate leaving property acquired by him, it would go as inheritance and as joint family property in the hands of his sons, grandson and great grandson - the eldest being the manager (*Karta*). The property could not be alienated by the manager. Males would have a share in the joint family property from generation to generation called coparcenary property. The importance of a male descendant was the spiritual need to worship the ancestors which gave him a status and right to share inherited property. In other words inherited property could not be sold or transferred by the head of the joint family called '*Karta*' (manager) but the same was held by him jointly with brothers, sons and male descendants.

5.9 Adoption

The concept of ancestral worship also developed the law of adoption amongst Hindus. If a person did not have a male offspring he was entitled to adopt a male issue so that there would be uninterrupted ancestral worship. The adopted son therefore, had equal rights with a subsequently natural born son in terms of the right to property, right to inherit and right to share the common kitchen, worship and estate. He would be joint with other male coparceners in food, worship and estate. However, if a natural son was alive then an adoption was not permitted.

5.10 Marriage

Marriage was not a contract but a life-long sacrament. The wife was regarded as '*ardhangni*' (half the body of the husband), and as the mother who would give her husband and family sons. She was of central importance. A Hindu male could marry again, particularly if the senior wife had no male issue to keep the line alive for the worship of ancestors. Polygamy was permitted and was common amongst the rich in traditional

8. Mulla: *Hindu Law*, 16th Edn., p. 42.

Hindu society. Thus, before statute law and statutory reforms, Hindu religion had a dominant influence on the law of inheritance, the law of adoption and the law of marriage.

5.11 Custom and Usage

In view of the vast amount of literature in the form of '*Shrutis*' and commentaries on '*Manusmriti*', which led to various sub-schools like "*Mitakshara*" and "*Dayabhaga*" etc., custom and usage in a group, community or territory became increasingly important. Even the '*Smritis*' ordain that if there was a conflict between the '*Smritis*' and custom and usage approved by society, the custom would prevail. This gave enormous flexibility to the judiciary and an enormous amount of case law developed during the British Rule and thereafter. In fact the Privy Council during the British Rule declares that "under the Hindu legal system clear proof of usage would outweigh the written text of the law"⁹ – but such custom had to be ancient, reasonable, certain, continuous and followed by persons in a group or locality in a reasonably uniform manner¹⁰.

6. Caste system

Mention of the caste system traditionally followed in Hindu Society is important. The caste system though flexible in early days, became rigid and based on birth. Originally, a person could change his caste by virtue of his efforts and learning or his wealth but over a period of centuries, caste got fossilized and inflexible. The original castes were '*Brahmana*' (Priest), '*Kshatriya*' (Warrior), the '*Vaishya*' (mercantile class) and '*Shudra*' class (agriculturalist and workmen). There were also the indigenous inhabitants which the Indo-Aryan people defeated and made into slaves who were "casteless" or outside the Caste. A male of a higher caste could marry a female of a lower caste but a female could not marry into a lower caste. Over a period of centuries many sub-castes were formed including sub-castes from people who migrated into India and were absorbed under the umbrella of the Hindu social system. The result was that a person could marry only within his caste or sub-caste (endogamy) and normally, a person marrying outside his caste was treated as an outcast. This caste system as part of Hindu religion had enormous impact on Hindu law.

Curiously, even when many Hindus were converted to Christianity they carried the caste label with them. A Brahmin-Christian would not marry a Shudra-Christian. Similarly, on the West Coast of India, many Hindus were converted to Islam but carried and continued the concept of joint family property for many generations.

7. British Rule and Reforms in Hindu Law

- 7.1 Over the centuries custom being predominant according to Hindu law - several undesirable customs and practices developed in some parts of India. The major reforms during British Rule may be noted.

9. Mulla: *Hindu Law*, 16th Edn., p. 73.

10. Rama Jois: *Legal and Constitutional History of India*, pp. 24, 26, 56.

7.2 'Sati' – Self Immolation by a Widow

The first major reform was as far back as 1827 when Lord Bentick as the Governor-General banned the barbaric custom of *Sati* (Suttee). This involved, traditionally, a voluntary self-immolation by a woman who becomes a widow. Later on, relations and members of the community forced a widow to immolate herself. Of course, this was a practice mainly in parts of North-West India. In many other parts widow remarriage was permitted and referred to even in some Vedic Texts.

7.3 Widow Remarriage

Another reform introduced was in 1856, namely the Hindu Widows Remarriage Act, 1856. By that statute a Hindu widow's remarriage was legalized and any custom to the contrary was overridden. Whatever right she had over the property of her late husband would be lost on her remarriage - though her individual properties remained with her.

7.4 Child Marriage Prohibited

Over a period of time because of diverse social and economic compulsions the institution of child marriages gained currency in several parts of India. By the Child Marriage Restraint Act, 1929 child marriages were prohibited and the age-limit for a male for marriage was 18 years and for a female 14 years. Later, by an amendment the age-limit has now been increased to 21 years in the case of a male and 18 years in the case of a female. Child marriage was made an offence. In other words any male above 18 years marrying a female, defined as a child would be liable to be punished. Further performance by a priest of such child marriages also became punishable. Additionally the parent or guardian of the child was also liable to be punished.

8. Reforms in Hindu Law – Post Independence

India achieved independence from British Rule on 15th August, 1947 with the enactment of the Indian Independence Act, 1947 by the British Parliament. On 26th January, 1950 India adopted its new Constitution. The ethos and philosophy of the Constitution included the concept of gender equality and non-discrimination on the ground of sex. Further, there was a very strong movement to reform and modernize Hindu law, rejuvenating and giving an equal status to women in terms of property as well as the institution of marriage and adoption.

As a consequence three major initiatives in reforming Hindu Law were adopted by the Indian Parliament. These three statutes are together loosely called the Hindu Code, and consist of the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956 and the Hindu Adoptions and Maintenance Act, 1959.

8.1 Hindu Marriage Act

Under the Hindu Marriage Act, for the first time, several new rights were created. All customs were overridden and the statute would prevail. A second marriage with either spouse living was prohibited and so were

child marriages. Further provisions for registration of Hindu marriages were enacted and judicial separation could be obtained on certain grounds like desertion, cruelty, adultery etc. Women were also given rights to avoid marriages on certain grounds. For the first time divorce was permitted to both spouses, on grounds of cruelty, desertion, conversion to another religion or mental disorder amounting to unsoundness of mind etc.

Later on by an amendment, divorce by mutual consent was permitted after the commencement of Marriage Laws Amendment Act, 1976 but after observing certain time-limits.

8.2 Hindu Succession Act

By the Hindu Succession Act, a woman's rights to property were substantially enlarged. She became an heir equally with the sons and daughters on the death of her husband in regard to his self-acquired property. Further, she got an equal right with the sons and daughters in the share of her late husband in joint family property. Her right to property became unfettered and was no longer limited to what was known as Hindu Woman's Estate *i.e.*, a right to enjoy property during her life-time but without any right to transfer or alienate.

8.3 Hindu Adoptions and Maintenance Act

Under the Hindu Adoptions and Maintenance Act, a female Hindu was given the right to adopt. A female Hindu who was not married could also adopt a son or a daughter. Under the classical Hindu Law a daughter could not be adopted nor could a female, married or unmarried, adopt (except a widow in certain circumstances). In this way customary Hindu law was overridden. In addition, certain increased rights of maintenance were given to a married Hindu woman.

8.4 Conclusion

In view of these revolutionary and far-reaching changes and codification, the influence of custom has become minimal and most of the classical sources of Hindu law *i.e.*, "*Shrutis*", "*Smritis*" and various commentaries of schools and sub-schools have only historical and academic value. Hindu law now is codified and there is very little necessity to go to its classical principles. However, the concept of joint family property is preserved.

Prof. Max Müller's hope of a "Reformation" in Hindu Law was substantially achieved.

9. Some Interesting Controversies

9.1 The "*Maharaj Libel*" Case – Vintage 1862¹¹

A story of courage is of an editor in Bombay called Karsandas Mulji. It is a story of sex debauchery and blind religious devotion. Vallabhacharya was a great Hindu saint and teacher in the middle ages. He preached the path of devotion, love, bhakti through the "*pushti*" marg. In Bombay, there is a very old temple called "Mota Mandir" where his descendant

11. P.B. Vachha: *Famous Judges, Lawyers and Cases of Bombay* (1962) P. 239.

functioned as a Preceptor and was called "*Maharaj*". He had an immense following including wealthy merchants, influential traders and leaders of the community. Over a period of time unhealthy immoral practices became prevalent and various rights were claimed by the religious head of the sect. Young members discovered that, after a wedding the bride did not go to her husband but was absent for a few nights and always on the wedding night. The young bride was sent to the "*Maharaj*" on the wedding night by her parents who were devout and blind believers. They believed that being "deflowered" by the "*Maharaj*" was ordained by their religion. The leader of the sect claimed that he had "the right of the first night" (in Roman Law "*jus primae noctes*" or in feudal custom "*Droit de Seigneur*" – "the right of the Lord").

It is difficult to imagine that young virgins of seventeen and eighteen were sent by their well-meaning parents to have sexual intercourse with a "godman".

In a series of explosive articles, Karsandas Mulji exposed this monstrous practice. There was a hue and cry and Karsandas was faced with abuse, ostracism, social opprobrium and public criticism by his community. He stood firm and continued his campaign. Ultimately the head priest was forced to file a suit for defamation against Karsandas. Karsandas engaged Anstey a leading practicing English lawyer then in Bombay.

The tale of religious fraud filled with trickery was exposed at the trial. The Case was known as "*the Maharaj Libel Case*". A courageous English judge Sir Joseph Arnould stated in his judgement.

"the principle for which the defendant and his witnesses have been contending is simply this that what is morally wrong cannot be theologically right and that when practices that sap the very foundations of morality . . . are pursued in the name and under the sanction of religion they ought for the common welfare of the society and in the interest of humanity itself to be publicly denounced and exposed. . . At a risk and a cost which we cannot adequately measure these men have waged determined battle against a foul and powerful delusion. They have dared to look custom and error boldly in the face; and proclaim before the world of their votaries that their evil is not good, that their lie is not truth. In thus doing they have done bravely and well".

Karsandas Mulji's brave fight emancipated the minds of many followers and redeemed them from debasing and defiling beliefs and practices.

The *Maharaj libel* case shows the power of the 'Pen' and how courageous and determined journalists and reformers can fight social evil.

9.2 Hindu Code Bill – *President Rajendra Prasad v. Prime Minister Nehru*

The conservative Hindu viewpoint was against the reforms contemplated by the Hindu Code. President of India Dr. Rajendra Prasad, a conservative and orthodox Hindu raised a constitutional question canvassing the view, whether he as the President can refuse to sign a Bill passed by

Parliament which was required before it became “law”. Prime Minister Jawaharlal Nehru who was an ardent supporter of the Hindu Code, took the stand that under the Indian Constitution the President was the constitutional head and was bound to act according to the advice of his Council of Ministers headed by the Prime Minister, which commanded the confidence of the House of the People in Parliament. The matter was then referred to Attorney-General Shri M.C. Setalvad who clearly opined in favour of the view, that the President was bound to act according to the advice of the Council of Ministers. This was in September 1951. In the Constitutional history of India immediately after the adoption of the Constitution in January 1950 it was a crucial controversy and if the Presidential power were not curtailed Indian democracy would have taken a different path.

A.K. Ayyar, whose opinion was sought by Nehru in correspondence stated that:

“the President’s ‘no’ raises points of such constitutional importance that, if conceded will upset the whole constitutional structure envisaged at the time when the Constitution was passed and will make the President a kind of dictator . . .”¹²

Setalvad in his autobiography¹³ also refers to the same incident and difference of opinion. His opinion unequivocally supported the view of Prime Minister Nehru that the President of India under the British parliamentary form of Government adopted by the Indian Constitution was a strictly constitutional head, and was bound to act according to the advice of the Council of Ministers. This view has now been adopted and confirmed by the Supreme Court.

9.3 Religious Conversion and Bigamy

An interesting question arises from time-to-time in relation to the law of Marriage and Divorce in India. On many occasions individuals change their religion with a view to marry again. A Hindu [or a Zoroastrian or a Christian] converts himself into a Muslim with a view to marry again, as Muslim Law in India permits four wives. Under the Indian Penal Code (Section 494) marrying again (bigamy) is a penal offence except where the second marriage is valid as among Muslims. The view adopted is that a Hindu if he marries again after conversion to Islam will be committing an offence unless his previous marriage is invalidated by a Court at the instance of the other spouse. Mere conversion does not bring to an end marital ties unless a decree for divorce on that ground is obtained from the court – till a decree is passed the marriage subsists and the offence of bigamy is committed.¹⁴

12. Granville Austin: *The Indian Constitution, Cornerstone of the Nation* (1986) pp. 140-142.

13. M.C. Setalvad: *My Life Law and Other Things* (2000) p. 172.

14. *Lily Thomas v. Union of India*, AIR 2000 SC 1650: (2000) 6 SCC 224.

- 9.4 India being a federal state, legislation was enacted in some states prohibiting and making conversions from one religion to another forcibly *i.e.*, by force, fraud or allurement. This legislation was challenged in the courts as an attack on the freedom to propagate religion. The Supreme Court upheld the legislation holding that the right to propagate one's religion under Article 25, does not grant the right to convert another person to one's own religion forcibly but is a right to transmit or spread one's religion by exposition of its tenets. Freedom of religion is not guaranteed in respect of one religion only, but covered all religions alike and there is no fundamental right to convert any person to one's own religion particularly when attempt to make forcible conversions would tend to inflame communal passions and lead to an apprehension of breach of public order.¹⁵

10. An Enlightened Emperor and A Modern Spiritualist

- 10.1 Emperor Ashoka (273-232 B.C) was the most illustrious Emperor of the Maurya Dynasty founded by Chandragupta. After the battle of Kalinga (modern Orissa) which led to enormous slaughter, deaths, burnings and pillage Ashoka's thinking radically changed. Over a period of time he became a Buddhist and he had various Edicts engraved on stones and pillars in all corners of his empire. These Edicts are found scattered over the length and breadth of India, from Punjab to Mysore and the Bay of Bengal. He espoused the message of tolerance, equality of all religions and faith and the principle of co-existence. Some of his Edicts encapsulate the great Indian philosophical thoughts, they are:

"Thus saith His Majesty - father and mother must be obeyed. In the same way respect for all living creatures must be enforced. — Truth must be spoken. . . . The religions of other people are all deserving of reverence for one reason or another¹⁶".

Ashoka's great name, example and Edicts have never been forgotten and they are adopted in the Indian National Emblem in the form of the Sarnath Lion Head and the Ashoka Chakra (Wheel) in the center of the National Flag.

- 10.2 A Spiritual Leader: Swami Vivekananda

In September 1893,¹⁷ as part of Chicago's World Fair, the World Parliament of Religions was called. Delegates of various Christian sects and representatives of other non-Christian religious groups attended. These included representatives of Buddhism, Hinduism, Jainism, Judaism, Islam and Schintoism. Swami Vivekananda, a highly educated wandering Monk (ascetic) supported by his followers reached Chicago and by accident met a Harvard Professor Dr. John N.D. Wright. On his recommendation to the Chairman of the Committee for Selection of Delegates Vivekananda was

15. *Rev. Stainislaus v. State of M.P.*, (1977) 1 SCC 677.

16. John Canning: *100 Great Kings, Queens and Rulers of the World* (2005). P. 104.

17. Based on Gautam Ghosh: *Swami Vivekananda* pp. 55, 58.

registered. Prof. Wright wrote to the Chairman “here is a man who is more learned than all our learned professors put together”. In his opening speech on 11 September, 1893 which took the Parliament by storm, he said that he spoke on behalf of Hinduism, on behalf of the most ancient Order of Monks in the world, the Vedic Order, of Sanyasis (ascetics who have renounced the world) and described Hinduism as the mother of all religions, a religion which has taught the world both tolerance and universal acceptance. His message was that no religion is superior or inferior to the other and he quoted from the *Vedas* and scriptures the following prayer:

“As the different streams having their sources in different places, all mingle their waters in the sea, so, O Lord, the different paths which men take, through different tendencies, various though they may appear, crooked or straight, all lead to Thee.”

11. CONCLUSION

11.1 The National Flag

The Indian National Flag has in its center the Ashoka Chakra. The National Emblem of India is an adoption of the Lion heads of the Ashokan Pillar at Sarnath. On the Emblem is described the motto “*Satyameva Jayate*”, - [“Truth Alone Triumphs”] a quote from the *Mundaka Upanishad*, the concluding part of the Hindu *Vedas*. The Flag and the National Seal encapsulate the ideals of the great Emperor Ashoka and our Republic.

The late Sarojini Naidu (called the Nightingale of India) speaking on the occasion of the adoption of our National Flag said:

“Whether we be Hindus or Muslims, Christians, Jains, Sikhs or Zoroastrians and others, our Mother India has one undivided heart and one indivisible spirit.”

- 11.2 What is the message of India? What is its religious philosophy? What is the great contribution of Hinduism, the dominant religion in India? This long and tolerant religious tradition now reflected in our Constitution, is “live and let live”.
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Random Recollections – Revisiting Kesavananda from a Personal Perspective

ILS Law College, Pune held celebrations on the 90th Birth Anniversary of Nani Palkhivala on 16 January, 2010 at Pune. The author was asked to contribute an article in which he revisited and reflected on the Kesavananda Bharati case while recalling the arguments on both sides. This article recounts some 'random recollections' in relation to the case, including the contribution of Dr. Dieter Conrad's articles to the development of the doctrine of basic structure and implied limitations; the supersession of three senior judges; the Emergency situation, and how H.M. Seervai, a vigorous critic turned into an admirer of the ratio laid down in the Kesavananda Bharati case.

1. When the ILS Law College, Pune Centre of Public Law requested me to write an article on "Experimenting with the Basic Structure Doctrine: A Lawyer's Perspective" as a topic, I thought that I would rather select a topic of my choice. I would not like to add to the considerable erudite and scholarly literature and comments on the Case. The eleven learned Judgments and their critical analysis is a daunting task which is best left to an academician particularly because the Basic Structure doctrine is now almost universally accepted and applauded in India. So I chose the easier alternative of indulging myself with some "random recollections" – some interesting – some amusing and some displaying the tensions between the principal "dramatis personae" in the case – both Judges and Lawyers.
2. Twelve of the thirteen judges are no more – the last to leave us being Justice Chandrachud. Palkhivala, Seervai, Niren De have also departed. Among the other counsel who appeared, Soli Sorabjee, myself, Sandip Thakore, and T.R Andhyarujina are all in the 70s. Before memories fade further it is best to record some anecdotal material which may be lost with the passage of time. It is in that spirit that I attempted this article.

3. Palkhivala's opening argument commenced on 31 October, 1972 and ended in December 1972. The total hearings took place for about 66 days. Normally the hearings were on Tuesday, Wednesday and Thursday, as Monday and Friday were for miscellaneous matters. We used to go to Bombay on Thursday evening and return on Monday evening.
4. I was briefed with Sandip Thakore for the Sugar factories of Maharashtra and was instructed by M.L. Bhakta, Solicitor (Kanga & Co.) and D.M. Popat, Solicitor (Mulla & Mulla). We were in the Nani Palkhivala team. Nani was a part-time Professor in the Govt. Law College during 1949-1951 and he taught us Jurisprudence and Evidence. Soli Sorabjee was also appearing for some supporting petitioners.
5. J.B. Dadachandji instructing us was the doyen of Advocates on Record. He was always the first choice because his firm had a strong infrastructure and support system of Staff, Juniors, Stenos and Cyclostyling systems. Palkhivala and Dadachandji were good friends and had fought and succeeded in the Bank Nationalisation and Privy Purse Cases.
6. Nani's accepting the brief for the Petitioners was uncertain till about a fortnight before the case started. He was hesitant because of time constraints as the case was likely to take a lot of time. In fact it started on 31st October, 1972 and Palkhivala's opening address concluded only in December, 1972.
7. M.C. Chagla former Chief Justice of Bombay who was then practising in the Supreme Court was to commence the leading argument for the Petitioners in the event of Palkhivala not taking up the case. Nani had the greatest admiration for Chagla and in his early years he leapt to fame in Chagla's court with considerable encouragement from the Bench. Chagla however felt that Nani, who was at the height of his unrivalled powers as an Advocate – must present the opening arguments in such a seminal and important case. Chagla used his enormous personal charm and influence to persuade Palkhivala to take up the responsibility of arguing the case. May be, in Nani's absence, the decision may have gone the other way.
8. Palkhivala reached Delhi a couple of days before the start of the argument. I distinctly recall my first meeting with Palkhivala at the hotel in New Delhi. He asked me and Sandip Thakore to give him a list of cases where Constitutional Amendments were struck down as invalid. We were taken aback and flummoxed – and told him that there was no such reported case where a Constitutional Amendment was challenged on substantive grounds. There were however cases where "the manner and form" *i.e.*, the requisite procedure and requisite majority were not observed and the amendments were challenged. Palkhivala's face fell and one could read the disappointment in his body-language.
9. We, however, gave him an article by Dr. Dieter Conrad of Heidelberg University, West Germany. Conrad had analyzed how Adolf Hitler had seized absolute and dictatorial powers by amending the German Constitution and thereafter subverted it. Conrad therefore had deeply

thought about the “amending power” in a Constitution and the passionate and convincing arguments in his lecture immediately lifted Palkhivala’s spirits. These postulates were the basis of Nani’s impassioned plea and address during the arguments in *Kesavananda Bharati*.

The Implied Limitations Doctrine

10. M.K. Nambyar was the leading counsel in *L.C. Golak Nath v. State of Punjab* and if one carefully reads the judgment of CJ Subba Rao the argument had been noted as under [AIR 1967 SC 1643 at 1664, para 40]:

“(40) The next argument is based upon the expression ‘amendment’ in Article 368 of the Constitution and it is contended that the said expression has a positive and a negative content and that in exercise of the power of amendment Parliament cannot destroy the structure of the Constitution, but it can only modify the provisions thereof within the framework of the original instrument for its better effectuation. If the fundamentals would be amenable to the ordinary process of amendment with a special majority, the argument proceeds, the institutions of the President can be abolished, the Parliamentary executive can be removed, the fundamental rights can be abrogated, the concept of federalism can be obliterated and in short the sovereign democratic republic can be converted into a totalitarian system of Government. There is considerable force in this argument. Learned and lengthy arguments are advanced to sustain it or to reject it. But we are relieved of the necessity to express our opinion on this all important question, as, so far as the fundamental rights are concerned, the question raised can be answered on a narrower basis. This question may arise for consideration only if Parliament seeks to destroy the structure of the Constitution embodied in the provisions other than in Part III of the Constitution. We do not, therefore, propose to express our opinion in that regard.”

I owe a debt of gratitude to my old and lifelong friend and distinguished author and critic on constitutional law A.G. Noorani (who has written in detail about this interaction) for sharing with me the correspondence between Nambyar and Prof. Dr. Dieter Conrad. When Nambyar came to know about Conrad’s lecture at the Banaras Hindu University he wrote a letter on 20th October 1966 to Conrad seeking his permission to cite the manuscript and Conrad readily agreed on 27 October 1966 but stipulated that the whole manuscript be presented to the court. This was the genesis of the argument of implied limitations which was developed by Palkhivala and ultimately resulted in the Doctrine of the Basic structure of the Constitution as a limit on the power of amendment.

The seed implanted by Nambyar inspired by Dr. Conrad’s lecture and developed by Nani Palkhivala in the Fundamental Rights case bore fruit in the majority judgments in *Kesavananda Bharati* case.

The Opening Address

11. Palkhivala was not fully prepared when the case started on October 31, 1972. But his grasp, pick-up and clear-headed formulation was unsurpassed and his mind functioned with the speed of lightning. His brain was like a sponge which not only very quickly absorbed facts, concepts and law but metamorphosed them into a convincing and unanswerable argument in record time.
12. He started by reading the *Golak Nath* judgment as one of the principal issues was whether it was correctly decided and required to be overruled. The *Golak Nath* Judgment had held that the word “law” in Article 13 included a Constitutional Amendment. An amendment which violated or abridged Fundamental Rights would be unconstitutional. However, 17th Amendment Act though invalid was saved by applying the doctrine of prospective overruling. As the *Golak Nath* Bench consisted of 11 judges a Special Bench of 13 judges was constituted for the *Kesavananda* case. The case started with the debate on the meaning of Article 13 and the word “Law” and whether a constitutional amendment abridging fundamental rights could be regarded as “law” within the meaning of Article 13 and the scope of Article 368. Could such an amendment be rendered unconstitutional as abridging fundamental rights?
13. An amusing interlude needs to be mentioned. Palkhivala started reading the *Golak Nath* judgment slowly and making his comments from time-to-time and he was interrupted by various members of the Bench. The trend of posing questions by several members of the Bench was along the following pattern:
 “Mr. Palkhivala, has the US Supreme Court not decided so and so?
 Has not the Canadian Supreme Court decided so and so?
 My recollection is that Privy Council many years back has dealt with the question?
 Do I recollect correctly that in *Sajjan Singh’s* case there is an observation made along the following lines ...?
 How do you get over the observation in *Shankari Prasad’s* case at page. . . ?
 Some members of the Bench were indulging in a competitive display of erudition.
14. Palkhivala’s method was, as far as possible, to answer immediately or latest by the next morning unless a long research was involved. As a result our energies as juniors were employed every evening, first in locating the relevant decisions and the relevant passages (many times a wild goose case) so that Palkhivala could answer them in court next morning. Again his response would lead to further discussions and more questions. This went on for almost a whole week and Palkhivala made little progress and became restless and was not sure as to when he could finish. CJ Sikri’s retirement in April, 1973 was known and time was running short.
15. C.K. Daphtary, (Former Attorney-General and a great wit) who was also briefed for one of the petitioners/interveners used to come at about 4

pm at the end of the day and would ask Nani as to how the case was progressing. Nani narrated what was happening and said "Chandubhai (Daphtary's first name) I am not making any progress and I am alarmed as to when I will be able to complete."

16. After the weekend break (as the matter was normally heard from Tuesday to Thursday) Nani recommenced his argument and there were no interruptions and the matter proceeded smooth and fast throughout the week. At the end of the week Daphtary again asked Nani as to how the matter was progressing and Nani responded that it was going very smoothly and there were hardly any interruptions.
17. Later the secret was revealed. Daphtary told us that he met Chief Justice Sikri at a function during the week-end and Sikri enquired as to why Daphtary was not seen in Court. Daphtary told him that he was receiving daily reports from his friend's young and attractive niece who was attending court daily. Daphtary asked her about her impression and she said – the case is going on very well and she was mightily impressed by the gravity, wisdom and intelligent remarks from the 13 judges from time to time. But she said there was one discordant note. These 13 wise and dignified judges who are contributing so much to the case are being interrupted from time to time by a young man standing opposite them. He should be removed.

Chief Justice Sikri told Daphtary – I have got your message.

The Hearing

18. A certain judge on the Bench would invariably fall asleep after lunch and some of us juniors—would take bets as to when he would again wake up. This continued for a long time. However I must confess that this characteristic was not shared by any of his colleagues on the Bench.
19. I recall a famous story about the English Court of Appeal. In the old days the judges never retired and some of them were quite advanced in age. An experienced Q.C. remarked:

"I have no objection to Lord Justice so and so going to sleep on the Bench but I strongly resent his snoring so loudly so as to disturb the sleep of his brother judges".
20. J.B. Dadachandji was instructing Palkhivala and he had his hand on the pulse of the case and knew behind the scene activities. Before the case started, he told us that there was a strong rumour that the Attorney-General, Niren De would object to Justice K.S. Hegde sitting on the Bench because he was reported to have expressed strong views on the subject in a speech. Dadachandji and his clients said that they have got ready an application against another Judge, (Justice Dwivedi) who was recently elevated by the Government, because in his farewell speech at the Allahabad Bar. He had openly stated that he would undo the damage done in the *Golak Nath* case. Happily no objections were taken by either side.

21. Another little known fact which I must share with you is that the then Law Minister H.R. Gokhale had made great efforts to convince H.M. Seervai, Advocate-General of Maharashtra to come and argue the case for the Government and defend the constitutional amendments. Seervai was briefed for the State of Kerala (which was the first Petition) and had stipulated that he would accept the brief only if he was to start the arguments on behalf of the respondents. The Government had agreed to this but it appears behind the back of the Attorney-General (AG) Niren De. The AG had worked hard for several months and had prepared excellent volumes and other documents/materials in support of the respondent's case.
22. Justice Jaganmohan Reddy (a member of the Bench) describes this in his autobiography "The Judiciary I served" at page 230. He recounts—

"Gokhale brought Seervai who only accepted on condition that he would begin on behalf of the respondents and Niren De would come after him. Ray and I, however, protested. We said the Attorney-General had precedence and he should begin and pointed out that the Chief Justice, Shelat and Hegde in the Bank Nationalisation case had said that this reversal of order could not be allowed. In any case Chief Justice Sikri later said it is for both Seervai and De to settle the issue and if De permitted, Seervai could start first. This, of course, was right but evidently by then at the instance of Gokhale, De was asked to give way to Seervai."

This tension (on the Respondent's side) between the senior counsel lasted throughout the hearing.

Jaganmohan Reddy's Autobiography gives an insider's view and is a mine of information.

Palkhivala concluded his arguments on 21st December 1972 with a flourish. He said something along the following lines:

"I am going to present to your Lordships the views of a very eminent constitutional lawyer. A view on fundamental rights which completely supports my case. Your Lordships would be surprised to know the name of the Author. The Author is none but H.M Seervai".

This created some amusement on the Bench. After this he quietly handed over three articles written by H.M. Seervai and published in the Times of India (Bombay Edition) on 14th February, 15th February and 16th February, 1955. They related to proposed amendments of the Constitution (the Fourth Amendment) during the lifetime of Jawahar Lal Nehru and contained passages attacking the proposed amendment which deprived a citizen of full compensation.

Seervai wrote:

"The Prime Minister would never make a mockery of the Constitution by providing for the confiscation of the ordinary man's property. I am afraid this very mockery is contained in the proposed amendment to Article 31A."

"The abolition of Zamindaris has thus no relevance to the vast powers of confiscation which are now sought to be acquired by the amendment of the Constitution".

"I shall consider the grave consequences of treating the Constitution as ordinary law to be changed at the will of the party in power and measureless harm that can be done to the economic and moral life of our country".

"If the effect of the amendments on the economic and moral life of the country will be grave, the effect on the young democracy of India will be disastrous since the Constitution will have been treated as an ordinary law to be changed at the will of the Party in power".

This flourish had a big psychological impact on several judges on the Bench. Seervai, on that day took it in his stride but it led to strained relations between him and Palkhivala for some time which later were happily resolved.

23. In March, 1973, before conclusion of the hearing, Justice Beg fell ill and the matter had to be adjourned for a few days. When the Bench assembled without Beg J., a suggestion was made that the arguments can continue and he can rejoin later. Meanwhile, the arguments could be recorded for his benefit. This was strongly opposed by both Niren De and Seervai and they threatened to withdraw from the case. To my best recollection, L.M. Singhvi (who was then Advocate-General for Rajasthan and who was supporting the respondents case) boldly disagreed. However, Beg, J. resumed attending the hearing. Palkhivala curtailed his final rejoinder to a few days and submitted the remaining arguments in writing. He had no choice because enormous costs had been incurred by the clients and the amount of time devoted by the 13 judges would be completely wasted if a second hearing was to take place after C.J. Sikri's retirement on 24 April, 1973.

The Impact of the Judgment – Emergency – Seervai changes his view

24. Now *Kesavanand Bharati's* ratio has been followed repeatedly in our Supreme Court judgments as well as in other jurisdictions. It is regarded as one of the greatest judgments of all time.
25. Seervai who was one of the strongest critics of the majority judgments changed his mind. In my Article in the book –"Evoking H.M. Seervai", I wrote:—

"He had firm views that the *Golak Nath* case was wrongly decided and that the Supreme Court had erred in propounding the doctrine of basic structure in the Fundamental Rights Case. This doctrine fettered and restricted the amending power of Parliament. But all this changed gradually but decisively as the excesses of the Emergency snowballed and the extreme contentions in *Indira Gandhi's Election* case (*Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299: (1976) 2 SCR 347, were argued. Seervai's outraged conscience found expression in his later comments on the judgment in the *Habeas Corpus* case which have already been mentioned

above. His considered views on the basic structure doctrine are now clarified in Seervai Constitutional Law of India (3rd Edn.) Vol. II at pages 2686 and 2692. To quote:

“We can now answer the question: does the doctrine of the basic structure provide a correct interpretation of Article 368? It is clear from our discussion that it appears to be the only doctrine which supplies an answer to the question.” (Page 2686 para 30.71)

“Coming to the second answer, our discussion has shown that the consequences of rejecting the doctrine of the basic structure would be so grave, and so opposed to the objectives of the Constitution, that the consequence of uncertainty would be insignificant by comparison. This is all the more so because the Kesavananda doctrine has neither prevented an amendment of the Constitution in the public interest nor the enactment of socio-economic laws...” (Para 30.77 at page 2692)

By taking a 180 degree turn Seervai showed a resilience a breadth of vision and a rare quality of intellectual honesty and integrity seldom found in human beings.

Palkhivala’s argument had won its final victory. Time and the Emergency had vindicated the majority view.

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Courage and the Courts

This article was published in The Indian Express on 9 January 2004 in the week celebrating the 125th year of the Bombay High Court building. It describes some glorious events in the theatre of the Bombay High Court including the case of N.P. Nathwani v. Commissioner of Police, (1976) 78 Bom LR 1 during the Emergency; the LIC-Mundhra scandal where M.C. Chagla and M.C. Setalvad displayed great courage; when H.M. Seervai as Advocate General battled against supersession of three senior judges in the Bombay City Civil Court and the courageous step of Sir Peter Grant in closing the doors of the then Supreme Court in Bombay on 1 April 1829.

The Bar and Bench at Bombay are celebrating this week the 125th year of the completion of the magnificent building housing the High Court. It is with a sense of pride that every child of the Bombay Bar must recall some glorious events played out in the theatre of a great court. The Emergency declared by Indira Gandhi in June 1975 led to the detention without trial of many Opposition leaders, including Jayaprakash Narayan, Morarji Desai, A.B. Vajpayee and L.K. Advani.

The Bombay police commissioner banned all public meetings of five persons or more. A private meeting of lawyers was called in October 1975 by N.P. Nathwani, a retired high court judge, where former Chief Justice, M.C. Chagla, former Chief Justice of India, J.C. Shah, and Nathwani would speak. The police commissioner banned the meeting on the ground that it would threaten the security of India and disturb public order. The ban order was challenged by Nathwani. Over 120 lawyers including Cooper, myself and Sorabjee, were in the fray for the petitioners led by Nani Palkhivala and Ram Jethmalani.

The first bench, Chief Justice Kantawala and Justice Tulzapurkar, both courageous and fearless judges, invalidated the order as being *ultra vires*, arbitrary and malafide. The locus of the petitioners even during the Emergency was upheld. The atmosphere in the court was electric. The galleries were full. During the hearing the police commissioner was summoned and cut a sorry figure when cross-examined by Ram Jethmalani. The message went round that notwithstanding the Emergency, the court will not remain silent. It was one of the finest hours for the Bench and the Bar.

In June 1957, Parliament was rocked by the LIC-Mundhra Scandal. LIC was alleged to have bought Mundhra shares at inordinately high prices to oblige the company. Under public pressure the Nehru government appointed then Chief Justice Chagla as a one member commission of inquiry. Chagla insisted on the then attorney general, M.C. Setalvad, being appointed to assist the Commission. The first public hearing started in January 1958 and the Chagla report was submitted to the government in record time in mid-February 1958.

Nehru during the inquiry in a public speech in Bombay made a strong pitch for his friend, Finance Minister T.T. Krishnamachari, obviously in an attempt to overawe the Commission. Yet Setalvad, in his summing up, strongly criticised Krishnamachari, Finance Secretary H.M. Patel and other high government officials of the LIC and Reserve Bank. Undeterred, Chagla submitted a scathing report which squarely blamed Krishnamachari (who thereupon resigned), and H.M. Patel and other LIC and RBI bigwigs. Setalvad was criticised as having failed to protect the government as Attorney General. He regarded his duty as counsel for the Commission to find out the truth in public interest and not to protect the Government. This was in the highest traditions of the Bar.

In England, Sir Hartley Shawcross and Lord Dilhorne, appearing before the Lynskey Tribunal and the Bank Rate Leak Tribunal respectively, had assumed the same stance. Dilhorne said to the Tribunal, "It is my duty to act here as in some other fields without any regard to political considerations of any kind and in discharging this duty I am not in the least concerned with — indeed I am completely indifferent to — political or personal results."

There would be no greater champions than Setalvad and Chagla in terms of courage, integrity, independence and desire to ferret out the truth in the public interest regardless of the consequences to their personal fortunes.

The Bombay City Civil Court was established in the late forties. The principal judge was normally selected on a seniority basis. Three outstanding senior judges — B.J. Divan, V.D. Tulzapurkar and J.R. Vimadalal — were overlooked and a favourite was appointed as principal judge from the district with the concurrence of the then Chief Justice. The three judges threatened to resign but were persuaded by H.M. Seervai, then Advocate General, to hold their hands. With matchless courage, and supported by the Bar, Seervai campaigned with the government and generated such pressure that the decision was reversed by transfer of the incumbent and the injustice was remedied. The principal judgeship went to B.J. Divan, who later retired as Chief Justice of Gujarat.

And finally a case which inspired Chimanlal Setalvad to join the legal profession as mentioned in his autobiography is worth recalling. The Supreme Court at Bombay — predecessor of the High Court — was manned by three English judges, Chief Justice West and Justices Chambers and Peter Grant. The judges issued a writ of *habeas corpus* for production of Moro Raghunath, imprisoned in Pune, and Bapu Ganesh, detained in Thane jail. The British governor refused to obey the writ twice. By this time Chief Justice West had retired and Justice Chambers had died. Sir Peter Grant, the only surviving judge, took the courageous step of announcing on April 1, 1829, that the Supreme Court

at Bombay had ceased to function on all sides and would remain closed until it received an assurance from the executive that its authority would be respected and its orders obeyed. The matter went on petition by the judges to the Privy Council, who held that the court has no territorial jurisdiction. However the bold stand of Sir Peter Grant was a great blow in maintaining the independence of the judiciary. For the inquisitive and the interested, the portrait of Sir Peter Grant is one of the many which adorn the large central court in our present high court building.

Our high courts, like Calcutta, Madras, Allahabad, Patna and Nagpur, have equally long and great traditions. We must share them, rejoice in them and try to measure up to the giants of the past both on the Bench and at the Bar. For a unified Indian legal profession, the great and continuous challenge is to preserve the rule of law on the bedrock of human rights. Every generation of Indian lawyers must drink deeply at the springs of the past and reinvigorate itself by setting ever higher standards in our profession to fight this never ending battle.

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Great Cases – Courageous Judges

This speech was delivered at the Government Law College, Mumbai on 12 January 2007 as part of M.C. Chagla Lecture Series. Several landmark cases and incidents, including the Habeas Corpus case, the LIC Mundhra scandal, James I and Chief Justice Coke, the Uttar Pradesh Judges' case, the Spycatcher case and some American judgments of Chief Justice Earl Warren are recalled.

INTRODUCTION

It is a great privilege to be invited to speak at a lecture series organized in the memory of Chief Justice M.C. Chagla. The students of the Government Law College, Mumbai by organizing these lectures have contributed enormously to renew and reinvigorate the young generation by revisiting the past. Chief Justice Chagla has been regarded as one of our great judges (if not the greatest).

It is said by a celebrated author that there are eight Cardinal Judicial Virtues. The virtues of independence, of courtesy and patience, of dignity, of open mindedness, of impartiality, of decisiveness, of an understanding heart and of social consciousness. Chagla had all these virtues in great abundance. But they were so well proportioned and balanced that Chagla made an incomparable and extraordinary judge.

The Rule of Law, Human Rights, Judicial Review and Independence of Judiciary are today's buzz-words in the legal fraternity.

But these concepts and norms are rooted in the past. Great battles were fought outside and inside the courtrooms to give life and meaning to these values. We owe a great deal to the struggle between the English Parliament and the Stuart Kings, to the French Revolution and the American Bill of Rights.

This morning I have chosen a few of the milestones from different ages and different countries – some well known others not so well known, but each thrilling and inspiring.

1. The Habeas Corpus Case and Justice H.R Khanna

The pride of place in Indian Constitutional history must go to Justice H.R. Khanna, a great Judge of our Supreme Court who displayed matchless courage during the Emergency.

Indira Gandhi lost her Election Case on 12 June 1975 and on her appeal in the Supreme Court she was only granted a conditional stay. As a result she could neither vote nor speak in the Lok Sabha. She became a dysfunctional Prime Minister.

Immediately thereafter on 25 June 1975, she proclaimed a State of Internal Emergency. In a mid-night swoop most of the prominent Opposition leaders including Jayaprakash Narayan, Morarji Desai, Atal Bihari Vajpayee and L.K. Advani were detained without charges and without trial. The Fundamental Right to Life and Liberty (Article 21) and Equality (Article 14) were suspended.

Many persons were detained all over India. Many High Courts were moved for release of the detained persons by a writ of *habeas corpus* on the ground that such orders were *ultra vires* and beyond the statute or were *mala-fide*. A writ of '*Habeas Corpus*' means the Court Orders the authorities "To produce an individual before it so that the Court can give appropriate orders". Nine High Courts upheld the maintainability of the Petitions.

A Bench of five Judges of the Supreme Court including Justice Khanna who was the next in seniority to Chief Justice Ray heard what has come to be known as the *Habeas Corpus* case [*A.D.M. Jabalpur v. Shivakant Shukla*, AIR 1976 SC 1207: (1976) 2 SCC 521. The only question before the Court was whether a petition for *habeas corpus* and other similar petitions under Article 226 were maintainable (notwithstanding the suspension of the Fundamental Rights) on the ground that the Orders were beyond the statute or were issued mala fide or were not in accordance with law. Four judges decided in favour of the Government holding that the petitions were not maintainable. Justice Khanna was the lone dissenter.

Justice Khanna in his autobiography "Neither Roses nor Thorns" writes about the *Habeas Corpus* case graphically. He says:

"In view of his (Attorney General's) submissions would there be any remedy if a police officer because of personal enmity killed another man? The answer of Mr. De (Attorney General) was unequivocal: "Consistently with my argument", he said, "there would be no judicial remedy in such a case as long as the emergency lasts", and he added: "It may shock your conscience, it shocks mine, but consistently with my submissions, no proceedings can be taken in a court of law on that score." The above answer put the matters in plain light and left nothing in doubt so far as the position of the State was concerned."

Justice Khanna in his judgment observed

"the question is not whether there can be curtailment of personal liberty when there is threat to the security of the State. I have no doubt that there can be such curtailment even on an extensive scale, in the face of such threat. The question is whether the laws speaking through the authority of the Court shall be absolutely silenced and rendered mute because of such threats".

His dissent was the only light in the atmosphere of total gloom. H.M. Seervai writes.

“The four judgments were delivered in the darkest hour of India’s history after Independence and they made that darkness complete”.

But the reaction in other democratic countries was heartening.

The New York Times on April 30, 1976 came out with an editorial which has become classic and is cherished by many of us who lived through those dark days.

“If India ever finds its way back to the freedom and democracy that were proud hallmarks of its first eighteen years as an independent nation, someone will surely erect a monument to Justice H.R. Khanna of the Supreme Court. It was Mr. Justice Khanna who spoke out fearlessly and eloquently for freedom this week in dissenting from the Court’s decision upholding the right of Prime Minister Indira Gandhi’s Government to imprison political opponents at will and without court hearings. . . . The submission of an independent judiciary to absolutist government is virtually the last step in the destruction of a democratic society; and the Indian Supreme Court’s decision appears close to utter surrender”.

In 1977, on the principle of seniority Justice Khanna was due for appointment as Chief Justice of India. His dissent in the *Habeas Corpus* case sealed his fate. On 28th of January 1977 Justice M.H. Beg who had decided in favour of the Government, in all the important cases was appointed Chief Justice of India superseding Justice Khanna. Justice Khanna sent in his letter of resignation immediately and taking advantage of his leave made it effective from March 12, 1977.

Justice Khanna writes in his autobiography that he told his sister before delivering the judgment “I have prepared a judgment which is going to cost me the Chief Justice-ship of India”.

A lesser man would well have agreed with a majority of four and not jeopardized his Chief Justice-ship, a culmination of a judicial career spanning over 25 years. And yet Justice Khanna preferred the voice of his conscience at enormous personal cost. It was Justice Khanna’s finest hour. He became a beacon and a symbol of selfless courage and lion hearted resolve to stand by what he considered to be right without regard to personal consequences.

2. *N.P. Nathwani v. Commissioner of Police, (1976) 78 Bom LR 1*

The Internal Emergency declared by Indira Gandhi in June 1975 led to the detention without trial of many Opposition Leaders including Jayaprakash Narayan, Morarji Desai, Vajpayee and Advani.

The Bombay Police Commissioner banned all public meetings of five persons or more. A private meeting of lawyers was called in October 1975 by N.P. Nathwani, a courageous Gandhian and retired Judge of the High Court, where former Chief Justice M.C. Chagla, former Chief Justice of India J.C. Shah and Nathwani would speak. The Police Commissioner banned the meeting on the ground that the meeting would threaten the security of India and disturb public order.

The ban order was challenged by Nathwani. Over 150 lawyers including K.S. Cooper, myself and Sorabjee were in the fray for the petitioners led by Nani Palkhivala and Ram Jethmalani.

The first Bench, Chief Justice Kantawala and Justice Tulzapurkar, both courageous and fearless judges, invalidated the order as being *ultra vires*, arbitrary and *mala fide*. The locus of the petitioners even during the Emergency was upheld.

The atmosphere in the Court was electric. The galleries were full. During the hearing the Police Commissioner was summoned and cut a sorry figure when cross-examined by Ram Jethmalani. The message went round that notwithstanding the Emergency the Court will not remain silent. It was one of the finest hours for the Bench and the Bar.

3. LIC – Mundhra Scandal¹

In June 1957 Parliament was rocked by the LIC-Mundhra Scandal. Life Insurance Corporation of India (LIC) was alleged to have bought Mundhra Company shares at inordinately high prices to oblige Haridas Mundhra. Under public pressure the Nehru Government appointed the then sitting Chief Justice of Bombay M.C. Chagla as a One Member Commission of Enquiry. Chagla insisted on the then Attorney-General M.C. Setalvad being appointed to assist the Commission. The first public hearing started in January 1958 and the Chagla report was submitted to Government in record time in mid-February 1958.

Prime Minister Nehru during the inquiry, in a public speech at Chowpatty in Bombay made a strong pitch for his friend Finance Minister T.T. Krishnamachari, lavishly praising him, obviously in an attempt to overawe the Commission. Yet, Setalvad in his summing up strongly criticized Finance Minister T.T. Krishnamachari and Finance Secretary H.M. Patel and other high Government officials of the LIC and the Reserve Bank.

Setalvad was criticized in and outside Parliament as having failed to protect the Government as Attorney-General. Setalvad regarded his duty as counsel for the Commission to find out the truth in public interest and not to protect the Government. This was in the highest traditions of the Bar.

Chagla, undeterred by Nehru's speech, submitted a scathing report which squarely blamed the Finance Minister Krishnamachari (who thereupon resigned), H.M. Patel and other high officials of LIC and Reserve Bank of India..

There would be no greater champions than Setalvad and Chagla in terms of courage, integrity, independence and desire to ferret out the truth in the public interest regardless of consequences to their personal fortunes.

4. James I and Chief Justice Coke: 1608 A.D

The role of Sir Edward Coke, Chief Justice of England in the fight against the absolute power of Stuart Kings is epic in its dimensions. I have drawn on Bernard Schwartz "Roots of Freedom" which has wonderfully recaptured the spirit of that encounter.

It was a cold wintry morning at Westminster Hall on November 13, 1608. James I was bent on establishing his absolute power claiming the Divine Right of the King. In his way stood Parliament and the Royal Courts of Justice. Under

1. For detailed accounts by the two main players Chagla and Setalvad – See Chagla: 'Roses in December' pp. (202-212) and M.C Setalvad: 'My Life' pp. (267-294).

the leadership of Chief Justice Coke the Courts had started interfering in the matter of prerogative powers, seizures and detentions and were issuing writs to review the decisions of local feudal and ecclesiastical courts. On that historic day King James claimed that:

“ Since the judges were but his delegates he could take any case he chose, remove it from the jurisdiction of the courts and decide it in his royal person ”

Chief Justice Coke answered:

“In the presence and with the clear consent of all the judges . . . that the King in his own cannot adjudge any case . . . but that it ought to be determined and adjudged in some Court of Justice, according to the law and custom of England”.

To this King James replied:

“That he thought that the law was founded upon reason, and that he and others had reason as well as the Judges ”.

Then followed the stirring and courageous reply of Coke which sends a thrill of pride in every lawyer and every Judge after so many centuries. He said that:

“ . . . True it was that God had endowed His Majesty with excellent science and great endowments of nature; but His Majesty was not learned in the laws of his realm of England and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it that the law was the golden metwand and measure to try the causes of the subjects”.

James was greatly offended and said:

“This means that I shall be under the law which is treason to affirm.”

To which Coke replied:

“That Bracton saith that the King, should not be under man but should be under God and law”.

5. *Sir Peter Grant—Supreme Court at Bombay ceased to function, 1829*

The Supreme Court at Bombay (predecessor of the High Court) was manned by three English Judges Chief Justice West and Justices Chambers and Sir Peter Grant. The Judges issued a writ of *Habeas Corpus* for production of Moro Raghunath imprisoned in Pune and Bapu Ganesh detained in Thane jail outside the island of Bombay. The British Governor (appointed by the East India Company) refused to obey the writ twice. By this time Chief Justice West had retired and Justice Chambers had died. Peter Grant the only surviving Judge took the courageous step of announcing on 1st April 1829 that the Supreme Court at Bombay had ceased to function on all sides and would remain closed until it received an assurance from the Executive that its authority would be

respected and its orders obeyed. The matter went on petition by the Judges to the Privy Council which held that the Court had no territorial jurisdiction [(1901) 12 English Reports 222 (243) (PC)] However the bold stand of *Peter Grant* was a great blow in maintaining the independence of the judiciary. For the inquisitive and the interested the portrait of Peter Grant is one of the many which adorns the large Central Court in the Bombay High Court building.

The Asiatic Register Vol. 28 page 351 quoted in 1 Knapp 1 at 59: (1901) 12 English Reports 222 at 243 (PC) reads as under:

“Before this decision had been pronounced the Supreme Court at Bombay had closed under the following circumstances
..... After this reply, Mr. Justice Grant, on 1st April 1829, declared that the Court had ceased on all its sides and that he would perform none of the functions of a Judge until the Court had received an assurance that its authority would be respected, and its process obeyed and rendered effectual by the Government of the Presidency”.

6. The U.P. Judges case—*Legislature v. Judiciary and the Media*, AIR 1965 SC 745

A historic clash between the Legislature and the Judiciary developed in 1964 in Uttar Pradesh. The facts read like a thriller and shook the entire legal world

Under the Indian Constitution Parliament and the State Legislatures have the same privileges as the House of Commons.

One Keshav Singh (a journalist) published a pamphlet critical of the manner in which the State Legislature functioned and was reprimanded as having committed its contempt by the U.P. Legislative Assembly. He wrote a letter which was regarded as a second contempt and he was sentenced to seven days' imprisonment on March 14, 1964. On March 19, 1964, B. Solomon, an Advocate moved the High Court for a writ of *Habeas Corpus* and obtained bail for Keshav Singh. The Speaker of the Assembly, the Chief Minister and the Jail Superintendent were made parties.

This order was passed by two judges of the High Court. The Assembly refused to respond but passed a resolution on 21st March 1964 deciding that the two judges (Beg and Sehgal, JJ) the advocate and the journalist were guilty of contempt of the Assembly and they be taken into custody and brought at the bar of the House. Warrants were issued by the Speaker against the judges, the advocate and the journalist. The two judges heard the news on the radio, and rushed to move the same High Court of which they were part, and asked for stay of the warrants. The High Court (twenty eight judges sat together) in a united show of strength and passed stay orders. Similar orders were passed by a bench of twenty three judges of the same court in the case of the advocate and the journalist. The crisis was nearing boiling point. The Speaker of the Assembly backtracked a little by referring the matter to the Privileges Committee of the Assembly and meanwhile withdrew the warrants. The Privileges Committee on March 26, 1964 decided to call the two judges, the advocate and the journalist before the Committee to render their explanation and issued notices. Thereupon

a Bench of twenty three judges issued an interim order prohibiting the Speaker and the Privileges Committee from implementing the Resolution and staying the notices. The cauldron had now reached boiling point.

Jawaharlal Nehru's administration through the President of India, on March 26, 1964 made a Reference to the Supreme Court of India for its Advisory Opinion on certain questions and this gave an opportunity to the legislature to withdraw its notices in view of the reference.

When the Presidential Reference was argued, the Assembly did not submit to the Supreme Court's jurisdiction by making it clear that an advisory jurisdiction was not a judicial function but was merely an opinion.

The Supreme Court sitting in a Bench of Seven Judges opined (by a majority of 6 against 1) that in India the Constitution was supreme and the Court was its interpreter as an independent judicial body; that the legislative assembly had the privileges enjoyed by the House of Commons at the commencement of the Indian Constitution and legislators had absolute freedom of speech in the House; the laws and rules made by the legislature in regard to its privileges would be subject to fundamental rights and would be void if they were inconsistent with them; that the High Courts and Supreme Court could issue writs of *Habeas Corpus* and that the two Judges and the larger Benches were competent to issue the interim orders they did; that the Legislative Assembly was not competent to direct the production of the judges, advocate and journalist before it for contempt when they attempted to enforce their fundamental rights.

The decision of the Supreme Court though technically not binding being advisory only, galvanized public opinion against the tough stand of the Assembly and defused the situation while upholding the primacy of judicial review and fundamental rights in a written constitution.

The sequel is worth noting. The Committee of Privileges of the U.P. Assembly (which had not submitted to jurisdiction) recorded that the opinion of the majority judges of the Supreme Court was wrong but "in view of the importance of the harmonious functioning of the two important organs of the State, *i.e.*, the Legislature and the Judiciary and the recent judicial pronouncement", the matter was recommended to be closed by an expression of displeasure (See *H.M. Seervai: Constitutional Law of India*, Vol. 2 (4th Edn.) p. 2195/2196.)

Chief Justice Warren

Chief Justice Earl Warren of the US Supreme Court (1953-1969) showed enormous courage and concern for the minorities. His vision, wisdom and leadership greatly improved the status of the Afro-American population. In his 27th Annual Benjamin Cardozo lecture before the Bar of the City of New York he refers to two cases.

7. *Johnson v. State of Virginia*, 373 US 61: 10 Led 2d 195

In 1963, a negro (as they were then called – later 'black' and now 'Afro-Americans') entered a Court Room. The sitting spaces in the Court Room were segregated between whites on one side and negroes on the other. The negro sat in a vacant seat on the white side and refused to move. He was cited for

contempt and sent to jail by the Judge. The State Supreme Court affirmed the decision. It was reversed by the Supreme Court of USA (*Johnson v. State of Virginia*, 373 US 61). Chief Justice Warren was shocked that such segregation in public Court Rooms could be permitted. The courage and humanity shown by Chief Justice Warren and his leadership in carrying the majority of the Court with him shows what a courageous judiciary can do to eradicate racial discrimination and protect human rights.

8. *Hamilton v. Alabama*, 376 US 650: 11 Led 2d 979

Gross racial discrimination against negroes was practiced in many of the Southern States of the USA. A white lawyer while examining witnesses addressed white witnesses as Mr. and Mrs. When he examined a negro woman called Miss Mary Hamilton he addressed her as Mary. She protested and insisted that she be addressed like other witnesses as "Miss Hamilton". The white lawyer persisted and she refused to answer. She was punished for contempt. On appeal the Supreme Court of Alabama confirmed but on appeal to the Supreme Court of the US the case was summarily reversed (*Hamilton v. Alabama*, 376 US 650).

9. *The "Maharaj Libel" Case, Vintage 1862*

Another story of courage is of an editor in Bombay called Karsandas Mulji and has been narrated by P.B. Vachha in 'Famous Judges, Lawyers and Cases of Bombay'. It is a story of sex debauchery and blind religious devotion. Vallabhacharya was a great Hindu saint and teacher in the middle ages. He preached the path of devotion, love, bhakti through the "pushti" marg. In Bombay there is a very old temple where his descendant functioned as a Preceptor and was called "Maharaj". He had an immense following including wealthy merchants, influential traders and leaders of the community. Over a period of time unhealthy immoral practices became prevalent and various rights were claimed by the religious head of the sect. Young members discovered that, after a wedding the bride did not go to her husband but was absent for a few nights and always on the wedding night. The young bride was sent to the "Maharaj" on the wedding night by her parents who were devout and blind believers. They believed that being "deflowered" by the "Maharaj" was ordained by their religion. The leader of the sect claimed that he had "the right of the first night" (in Roman Law "jus primae noctes" or in feudal custom "Droit de Seigneur" – "the right of the Lord").

It is difficult to imagine that young virgins of seventeen and eighteen were sent by their well-meaning parents to have sexual intercourse with a "godman".

In a series of explosive articles, Karsandas Mulji exposed this monstrous practice. There was a hue and cry and Karsandas was faced with abuse, ostracism, social opprobrium and public criticism by his community. He stood firm and continued his campaign. Ultimately the head priest was forced to file a suit for defamation against Karsandas. Karsandas engaged Anstey a leading practicing English lawyer then in Bombay.

The tale of religious fraud filled with trickery was exposed at the trial. The Case was known as “the Maharaj Libel Case”. A courageous English judge Sir Joseph Arnould stated in his judgement—

“the principle for which the defendant and his witnesses have been contending is simply this that what is morally wrong cannot be theologically right and that when practices that sap the very foundations of morality . . . are pursued in the name and under the sanction of religion they ought for the common welfare of the society and in the interest of humanity itself to be publicly denounced and exposed. . . . At a risk and a cost which we cannot adequately measure these men have waged determined battle against a foul and powerful delusion. They have dared to look custom and error boldly in the face; and proclaim before the world of their votaries that their evil is not good, that their lie is not truth. In thus doing they have done bravely and well”.

Karsandas Mulji’s brave fight emancipated the minds of many followers and redeemed them from debasing and defiling beliefs and practices.

The Maharaj libel case shows the power of the ‘Pen’ and how courageous and determined journalists and reformers can fight social evil.

10. *The Spycatcher Case (Attorney General v. Guardian Newspaper, (1987) 3 All ER 316)*

Peter Wright, a member of the British Secret Service MI5 authored a book of Memoirs called “Spycatcher”. He disclosed various secrets. The British Government moved the English Courts to stop publication of the book and also reports of Court proceedings in Australia where the English Government had moved to injunct its further publication. Meanwhile the book was freely available in USA and outside England and was in the public domain. The Court of Appeal granted an injunction. The House of Lords by a majority of three against two not only upheld the ‘gag’ Order but enlarged it. The British Press was furious. There was a stinging attack on the judges of the House of Lords, *The London Times* came out with a blistering editorial. It said:

“Yesterday morning the law looked simply to be an ass. Those who regretted this fact were waiting with quiet confidence for the Law Lords to do something about it. We hoped that they would accept the reality that the secrets of Mr. Peter Wright’s book ‘Spycatcher’ were irretrievably in the public domain . . . but yesterday afternoon the law was still an ass. But as a result of their Lordships judgment it was no longer a dozy docile domestic creature whom a kick in the right place would restore to useful activity. In the hands of Lord Templeman, Ackner and Brandon (the majority who ruled for the gag order) it had become unpredictable and wild, seemingly responsive only to autocratic whims.

The Daily Mirror came out with a front page caption “YOU FOOLS” and published the photograph of Lord Templeman, Ackner and Brandon upside down. This front page has now been immortalized as a cover in a book by Simon Lee called “Judging Judges”. This robust criticism did not trigger any contempt proceedings.

So much for the freedom of speech.

Conclusion

Many of you will, in the future practice law and some of you will have an opportunity of administering justice as Chagla did. M.C. Chagla is no more. His generation is no more. In a few years those who have seen him as a Judge will slip into the past. But he has left behind his autobiography “Roses in December” – a priceless heritage for future generations. It is a bridge between the past and the present and I hope it will always illumine the path of many generations of young lawyers including many of you.

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Legal Services and Market Access Issues

This speech was delivered at the International Congress on Exposition of Trade in Services held at New Delhi between 4-6 October 2006. It deals with foreign lawyers and their attempt to enter the legal services sector in India and the contentious issues and views of the Indian Bar.

1. Introduction

- 1.1 The 21st Century promises increasing globalization and further opening up of many sectors for investment, trading commercial and professional activities throughout the world.
- 1.2 India having actively accepted the challenge of being part of this great adventure has to face the challenge and the problems arising out of this shrinking of barriers all over the world. Access to the Legal Services Sector by foreign lawyers, mainly Foreign Legal Consultants (FLCs) is being discussed in India for over a decade.
- 1.3 Our approach should be to integrate our system internationally in a manner consistent with the trends in Asian countries. Our stance should not be hostile or antipathetic but open and constructive. Our national interest and institutions should be of prime concern.
- 1.4 And yet we must remember that foreign lawyers want to practice in India not out of charity but because they perceive a great business opportunity. And foreign governments, particularly the US government is seen the world over as aggressively pushing for the services markets for the benefit of its own countrymen.
- 1.5 A leading American lawyer put it pointedly when he said—
“just as a good airplane pilot should always be looking for places to land, so should a lawyer be looking for situations where large amounts of money are about to change hands”.

2. Consultation Paper on Legal Services – July 2006

- 2.1 A consultation paper on legal services under GATS (General Agreement on Trade in Services) prepared by the Department of Commerce has been put on the website in July 2006. It mentions that India is currently

involved in multilateral negotiations regarding trade in services including the legal services sector. It invites comments which could assist the Indian Government in its negotiations. It raises issues and questions which are reproduced in *Annexure-I* to this presentation.

- 2.2 It gives some useful information by giving the UNCPC (United Nations Central Product Classification) definitions regarding legal services. It describes Mode 1 (Cross Border Supply); Mode 2 (Consumption Abroad) Mode 3 (Commercial Presence) and Mode 4 (Movement of a Natural Person) by which services can be supplied in a foreign country. Each country is required under GATS to say whether or not they allow Foreign Service supplier to establish a Law Firm in their market or allow entry to a foreign lawyer to do business in its jurisdiction.
- 2.3 The paper states that according to WTO statistical approximation Mode 3 and Mode 4 account for 50% and 1-2% of the total commercial service flows. In 2005 1/5th of the total global exports were covered by trade in commercial services valued at more than US\$ 2.50 Trillion worldwide. It is not clear what portion of this is covered by legal services.
- 2.4 The paper says: (Para IV.3)

“India has not undertaken any commitment in the legal services sector during the Uruguay Round of Negotiations. It has neither offered for any commitment in legal services in its initial offer nor in its revised offer submitted at the WTO during the course of on going Services Negotiations under GATS. FDI is not permitted in this sector. International Law Firms are not allowed to establish offices in India. Moreover Indian Advocates are not permitted to enter into profit sharing arrangements with the persons other than Indian Advocates. Foreign Law Firms are not permitted to open offices in India as per the Advocates Act, 1961 and they are also prohibited from doing any legal advice that could constitute practicing of Indian Law.”

The paper further states that:

“Having functioned in such a limiting framework for the past 50 years, the Indian legal profession is today ill equipped to compete on par with International Lawyers who have grown their practices in liberalized regimes and have vast resources at their disposal. It is further to be noted that there are only a few firms in India having the expertise to handle commercial work for multinationals.”

- 2.5 The paper mentions some of the domestic restrictions and impediments which hinder Indian law firms from competing effectively. These are limitation on the number of partners to 20; bar on advertising; bar on entries in Law Directories; lack of finance for lawyers not being treated as industry; no limited liability partnerships permitted; and multi disciplinary firms not permitted.
- 2.6 The paper also mentions requests made to India on opening up its legal services sector and permitting foreign legal consultants (FLCs) to open offices and permit practice in India. This includes countries like US,

EC, Australia, Singapore, Japan, China, Switzerland, New Zealand and Brazil.

- 2.7 The consultation paper is curiously silent or presumably unaware of the demands made by the organized profession repeatedly, the issues raised by the profession and the Law Commissions extensive discussions on restructuring the Advocates Act because it finds no mention in this paper. It is therefore necessary to set out some background facts.

3. Views of the Indian Legal Profession – The Bar Association of India

- 3.1 The Bar Association of India passed a Resolution at its Executive Committee meeting held on 5 October 1994. It *inter alia*, stated:

“Keeping in mind these perambulatory statements in GATS the Bar Association of India at the meeting of its Executive Committee held on 5th October, 1994 has resolved:

- (a) that a Task Force should be set up to clearly define India’s “National Policy Objectives” in relation to legal services; and
- (b) that appropriate guidelines and norms for regulating entry of foreign lawyers/firms for rendering legal services in India be formulated.

The Bar Association of India accordingly requests the Government of India to forthwith appoint a High-Powered Committee in which representatives of this Association and representatives of other lawyer organisations should be associated to help set down India’s National Policy objectives in respect of legal services by foreign nationals and the regulatory framework thereof as also suggest appropriate guidelines and norms for entry of foreign lawyers/firms into India.

The Executive Committee of the Bar Association of India is of the considered view that in principle, our legal system ought to integrate internationally under an appropriate regulatory system which ensures:

- (1) a general reciprocity of rights, and non-discrimination.
- (2) Foreign lawyers/firms are subject to the same disciplinary jurisdiction as Indian lawyers; and
- (3) Greater opportunities for the future development of the entire legal profession in India.

It was also resolved that this resolution be conveyed to the Government of India and to all appropriate authorities and bodies.”

- 3.2 Several seminars and conferences discussed these issues in the nineties. There was no significant response by the Governmental authorities, neither was a Task Force set up to define national policy objectives in relation to legal services nor was the profession consulted or involved in the process of international negotiations. In other words there was for over a decade a *total disconnect* between the legal profession and the governmental authorities.

4. Muddled Waters: Attempt to Open Offices by FLCs

- 4.1 Power Projects were big stories in India in mid-nineties and the then Finance Minister, Manmohan Singh was actively promoting foreign direct investments. Three large International Law Firms, viz. White & Case (USA), Chadbourne & Parke (USA) and Ashurst Morris Crisp (UK) applied for permission to open Liaison Offices under Section 29 of the then Foreign Exchange Regulations Act, 1973 (FERA). Section 29 dealt with permissions "*for carrying on any activity of a trading, commercial or industrial nature.*" The FLCs *did not* apply under Section 30 of FERA which deals with grant of permissions to *practice a profession or occupation in India.*
- 4.2 These law firms chose a short cut opting for bureaucratic protection rather than openly engaging in a dialogue with the government and the legal profession.
- 4.3 Litigation by Lawyers Collective : 1995 : Public Interest Litigation
A Public Interest Litigation was instituted against them in the Bombay High Court by "Lawyer's Collective" (W.P No. 1526 of 1995) an NGO contending that firstly they were practicing law contrary to the Advocates Act, 1961 and secondly they were in breach of the conditional permission granted to them by the Reserve Bank of India (RBI).
- 4.4 These firms distributed worldwide literature to their clients claiming that they had established offices in India. Admittedly they advised Indian and Non-Indian clients by drafting documents, conducting negotiations, reviewing and providing comments on documents and advising clients on their transactions. They contended that they were not practicing the profession of law as mentioned in Section 29 of the Advocates Act, 1961 and which related only to practice in the Courts of Law. Presumably having obtained permission under Section 29 of FERA their *self admitted* claim was that they were *carrying on trading, commercial or industrial activity* and were not practicing a profession or occupation in India. This was a demeaning stand. They characterized their activity as trading and commercial and therefore not professional.
- 4.5 On both counts the Bombay High Court expressed its *prima facie* view in its interlocutory order dated October 4/9, 1995.

"*Prima facie* it appears that the activities mentioned above carried on by Respondents 12 to 14 (*i.e.*, the FLCs) would amount to practicing the profession of law."

The Court also held at the interlocutory stage that:

Prima facie it appears that the permission to Respondents 12 to 14 (the three FLCs) nowhere allows them to practice the profession of law....."

This fact is also made clear by the affidavit in reply filed by S.G. Sargoankar, Deputy General Manager, Exchange Control Department of the Reserve Bank of India wherein it has been stated that –

"It *prima facie* appears that Respondent 13 is acting in violation and beyond the scope of the permission granted to them by Respondent No. 8 (Reserve Bank of India) for posting a representative for liaison purposes."

The Court directed the authorities to conduct an enquiry and to take appropriate action if there is a breach of any of the provisions of law.

5. Negative Effect on Reputation of FLCs

- 5.1 The outcome of the enquiry has not been reported to the Court. It appears that these firms are no longer functioning from their offices in India. This litigation created a very negative feeling against large International Law Firms and created a very unfavourable impression in the profession against the methods used by them. Were they indulging in trading or commercial activities or were they legal professionals?
- 5.2 These negative perceptions of the manner in which these three law firms wanted to come into India through the backdoor was heightened by the fact that some of them employed well qualified young lawyers related to top serving or retired Indian bureaucrats to leverage and give them immunity for their openly breaching the conditions of the RBI permissions.
- 5.3 But for the Public Interest Litigation of the "Lawyer's Collective" these firms would have successfully evaded the Indian Law under the umbrella of protection available to them from the Indian bureaucracy which functions in an opaque, non-transparent and non-accountable manner

6. Law Commission of India

- 6.1 The Indian Law Commission Working Paper on the review of the Advocates Act, 1961 in Chapter IV deals with this problem. It says:

"The American Law Firms and the US Government have been aggressively pushing for the services market in other countries for the benefit of their countrymen. US and some other advanced countries have large law firms operating on international scale which are primarily business organizations designed to promote their giant client corporations. Mr. Anil Divan, Senior Advocate, Supreme Court of India who has done a lot of work on this subject says that the very size, power and influence of these large international law firms would tend to adversely affect the legal and political systems of host countries which are nascent democracies and may pose a new threat to purity in public life."
- 6.2 The Law Commission issued a Working Paper on the Review of the Advocates Act, 1961. Part IV of the Working Paper deals exhaustively with entry of foreign legal consultants and liberalization of legal practice. It surveys the International Bar Association (IBA) "Basic Principles and Guidelines".
- 6.3 The Basic Principles set out by the IBA are:

- A. FAIRNESS AND UNIFORM TREATMENT. Any proposal dealing with developing standards for international legal practice must be based upon principles of uniformity and non-discriminatory treatment. If we are to develop a truly world wide profession, then all regimes including those dealing with FLCs – should be fair and should promote effective non-discriminatory treatment.
 - B. CLARITY. The permitted scope of, and the limitation on the practice of FLCs should be made clear. This is comparable to General Agreement on Trade in Services (“GATS”) principle of “transparency”.
 - C. PROFESSIONAL RESPONSIBILITY. The professional responsibilities of FLCs should be clearly articulated and the rules governing their conduct should be designed to promote confidence in the profession and to protect the public interest.
 - D. REGULATION. The right of the host authority to regulate the FLC should be explicitly confirmed.
 - E. REALITY AND FLEXIBILITY. The FLC proposals should be based upon principles which recognize what lawyers actually do, and they should not be designed to protect the local bar from foreign competition. The goal should be to promote the adoption of realistic regimes which facilitate the delivery of legal services while maintaining professional standards. Any regime which departs from this approach will likely fail in the long run because lawyers (and their clients) will simply find their ways to accomplish their objectives.
- 6.4 The Law Commission discusses briefly the structures as then existing in many Commonwealth countries.

At page 44-45, it sets out my views and then discusses the then existing Hong Kong model:—

“Mr. Anil Divan, Senior Advocate who has done a good amount of work on this question has, after examining the rules and regulations prevailing in various countries regulating the entry and practice of FLCs, suggested the following regulatory system for India. According to him, the following points will have to be kept in mind while restructuring the proper regulatory regime:—

- (1) The distinction between foreign lawyers, who want full Indian practice in courts in India and Foreign Legal Consultants (FLCs) must be kept in mind. If a foreign lawyer wants to practice in Indian courts, he must enroll himself as an advocate with rights to full practice and subject to immigration and foreign exchange or other required permissions and approvals.
- (2) Most foreign lawyers are not interested in practicing in courts. They are interested in legal consultancy practice in non-contentious legal business and that area is of immediate concern.
- (3) Any regulatory system permitting foreign law firms must be under Rules of courts with inputs from Indian lawyers and must keep in view:—

- (a) Reciprocity rights of Indian lawyers in foreign country's jurisdiction.
- (b) Disciplinary control and maintenance of ethical standards as prevailing in India.
- (c) Undertakings that the FLCs will not practice Indian law or employ Indian lawyers or hold themselves out as advising on or practicing Indian law. Most jurisdictions confine FLCs to practice of laws of their own country (States in U.S., Hong Kong, Australia, etc.).
- (d) They must undertake or make available for inspection and scrutiny their records at any time by a suitable inspector/regulator and give them access to their records, if there is any suspicion or allegation that they are breaching the above conditions and are practicing and/or advising on Indian Law.

In the event of Foreign Legal Consultants desiring to practice in India it requires consideration whether he/it should do so under a written agreement with local Indian firm as an Associate with an Indian firm's name getting more prominence and Foreign Legal Consultant shown as Associate.

- (e) In this connection the Hong Kong regulatory regime is a detailed one and would be of considerable help and importance. The foreign legal consultants must disclose the regulations of country of their origin or their local jurisdictions indicating whether Indian lawyers were permitted to set up practice in their own country. They must also disclose the hurdles, if *any for immigration and work permit rules in their country*. This would only enable the Indian regulatory authority to decide whether or not and on what conditions they should be permitted foreign legal consultancy practice in India."

6.5 The Law Commission also examines the provisions of GATS (General Agreement on Trade in Services) signed on 15th April 1995. It also sets out *in extenso* the Resolution of the Executive Committee of the Bar Association of India dated 5th October 1995 (Page 55). Having discussed the current Indian statutory law, the Law Commission has made its recommendations and proposed certain draft amendments to the Advocates Act, 1961 which was the mandate under which it prepared its Working Paper on the review of the Advocates Act, 1961.

6.6 The salient points in the suggested amendments are:

- "Practice" is clarified to mean all legal services including advice, research, documentation, etc.
- Setting up of an authorized committee by Bar Council of India to recognize foreign qualifications.
- Additional qualifications for overseas national who seeks to practice law.

- Multidisciplinary practice by lawyers in partnership with non-lawyers.

7. The Bar Council of India

7.1 The Bar Council of India is the highest elected statutory body constituted under the Advocates Act, 1961.

7.2 The important Resolutions of the Bar Council of India are Resolution No. 71/1994, Resolution No. 6/1997 and Resolution No. 35/1999. Under these Resolutions certain Rules have been framed called "*Foreign Degrees Recognition and Enrolment of Foreign Lawyers in India Rules and Enrolment of Indian Nationals obtaining degrees in Law from Foreign Universities Rules, 1997*". The relevant Rules regarding foreign lawyers are, Rules 3, 5 6 and 7 to 11, which are as under:—

"RESOLUTION NO. 6/1997

"(3) Subject to the provisions of Advocates Act, 1961 a foreign national who has obtained a degree in law from any Institutions/University recognized by the Bar Council of India and who is otherwise duly qualified to practice law in his own country would be allowed to be enrolled and/or allowed to practice law in India provided that a citizen of India, duly qualified, is permitted to practice law in that country.

- (5) No foreign lawyer shall have right of audience in a court of law in India unless there is reciprocal right of the same kind to an Indian lawyer in the country of that lawyer's origin.
- (6) A foreign national allowed to practice law in India under these rules shall be subject to the following conditions.
 - (1) He will be subject to the disciplinary jurisdiction of the concerned State Bar Council.
 - (2) A *separate register* of the foreign nationals enrolled and allowed to practice in India would be maintained by the respective State Bar Councils and intimation in respect of every such registration shall be given to the Bar Council of India which also shall maintain a separate register for the same."

RESOLUTION NO. 35/1999

- (7) "The word 'Practice of Law' shall mean all types of legal services including the representation in Court, Tribunal or statutory bodies or persons as well as advice, research documentation, circulation and letter information services as necessary for legal action, alternate dispute techniques and other such services."
- (8) Entering into any partnership or liaison office with the Indian National shall be deemed to be an act of practice. It cannot be done in violation of the Act and Rules framed by the Bar Council of India.
- (9) No foreign lawyer can have right of practice in India if he violates the foreign exchange regulations under Section 30 of the Foreign Exchange Regulations Act.

- (10) No foreign lawyer shall be entitled to act as legal consultant and advising his clients in India except in the case allowed by the Bar Council concerned subject to fulfillment of other conditions under the Act and the Rules.
- (11) Notwithstanding anything contrary of any act or law "No foreign Lawyer shall be entitled to practice law of the Host Country."

7.3 A further Resolution of the Bar Council states:

"The Bar Council is of the opinion that if any foreign degree is recognized that should be subject to the further condition that such a person shall have to pass the examination such as Constitution Laws of India and general basic laws of India as may be prescribed by Bar Council of India and *ipso facto* by a factum of mere recognition of foreign qualification by Bar Council of India, such person will not be entitled to admission as advocate under the Advocates Act."

- 7.4 In February, 2000 the Legal Education Committee of the Bar Council of India made certain recommendations regarding the holding of examinations of Indian nationals having recognized foreign qualifications. In April 2000 a syllabus was suggested. Six papers namely "Indian Legal System and Constitution of India", "Family (Personal) Laws of India", "Environmental and Consumer Laws", "Criminal Procedure Code and Criminal Evidence", "Civil Procedure and Transfer of Property Act", "Indian Legal Profession and Code of Ethics" form the syllabus. This has been adopted by the Bar Council of India in May 2000.
- 7.5 On inquiry with the Bar Council of India it appears that there is no name of any foreign national on the register of the Bar Council of India as mentioned in Rule 6 set out above. The position of State Bar Council Rolls is not available.

8. JETCO - Legal Services in India

- 8.1 Certain developments at the governmental level have taken place which need to be noticed.

The UK-India Joint Economic and Trade Committee (JETCO) was set up in pursuance of the UK-India Joint Declaration made at London by the Prime Ministers of the UK and India on September 20, 2004. The Joint Chairmen of JETCO were Shri Kamal Nath, Minister for Commerce and Industry on the Indian side and British Minister, Mrs. Patricia Luis, Secretary of State for Trade and Law. The Joint Chairs agreed to:

- "to set up a mechanism to examine the requirements on non-practice legal advisory services for enhancing trade and investment. It would include industry representatives and would submit its suggestions to the Minister within the next six months."
- 8.2 Two teams of lawyers were formed – The British Team and the Indian Team. It appears that for the first time some practicing legal professionals were involved though they did not represent either the Bar Association of India or the Bar Council of India. It is believed that the report of both the Teams and their comments on each others reports were submitted.

- 8.3 *The Reports of the two JETCO teams are not available to the public. They have also not been put up on the Ministry of Commerce Website.* It is believed that the proposal made by the British team and the views expressed by the Indian team did not match. It is surprising that as on 30 August, 2006 the consultation paper put on the Ministry of Commerce website does not refer to the recommendations of the Indian or British teams nor an analysis of the points of agreement and disagreement.
- 8.4 As these reports have not been put on the website by the Ministry of Commerce and are not available to the profession it is difficult to comment upon the two views.

The complete disconnect between the public, the profession and the government continues.

9. Issues and Concerns

9.1 The following Issues and Concerns require immediate attention:

- What are the National Policy Objectives in relation to legal services? Have they been formulated? If so, have they been communicated to the legal profession?
- Should not the Government prepare and circulate a complete Position Paper containing all the available information and views including:
 - (a) The views of the Working Paper prepared by the Law Commission of India.
 - (b) The stance and position of the legal profession including the Bar Association of India and the Bar Council of India.
 - (c) Full text and an analysis of the views of the British and Indian teams of JETCO which are not in the public domain and not on website and which are being treated as confidential documents.
 - (d) The report of the RBI inquiry into alleged breaches committed by the three law firms (FLCs) as directed by the Bombay High Court in the Public Interest Litigation commenced by the Lawyers Collective and putting the same on the web site and into the public domain.
- Most importantly and the core of the matter is a regulatory structure for disciplining and overseeing the activities of foreign lawyers in India which must be Court controlled and monitored with effective inputs of legal professional bodies. It is imperative that to be credible this machinery is not bureaucratic and not capable of being influenced by foreign lawyers.

10. Summation

- 10.1 If a further confrontation with the Indian Legal Profession is to be avoided it is essential that the Government must share all information with the profession and the public. Governmental and bureaucratic apathy in the past has unfortunately delayed the process of opening up of the legal services sector. The negative effect of the Lawyers Collective litigation in the Bombay High Court and the manner in which three large international

law firms wanted to circumvent Indian laws have further delayed a mutually beneficial entry of FLCs in India.

- 10.2 The situation in India is in striking contrast to the attitude and approach of many foreign countries. Most Governments including Hong Kong, Japan, Australia, etc., involved legal professional bodies and their representatives in preparatory and other meetings held before and after GATS and various rounds of negotiations.
- 10.3 The approach of the Indian legal profession should be constructive but it has to be based on reciprocity, national interests, accountability to Indian disciplinary authorities and sufficient protection from domination by large mega law firms in consonance with national interests which is clearly contemplated by GATS.
- 10.4 If FLCs are allowed access to the Indian market in legal services under a weak and non-transparent bureaucratic mechanism/structure it will not command the confidence of either the public or the legal profession. It is desirable that the temptation of circumventing Indian law and regulatory mechanisms should not be an option for an FLC.
- 10.5 We must put behind the unfortunate experience which surfaced in the Bombay litigation and move forward but only after the RBI report is put in the public domain. A further confrontation with the legal profession is best avoided by a strong and transparent regulatory framework under court rules with the participation of legal professional bodies together with wide powers to inspect and examine all files and records of FLCs in India as prevailing in many countries.
- 10.5 As always, much will depend upon the persons who exercise power – political or bureaucratic - and whether they are inclined to avoid any further disconnect with the profession by adopting a policy of complete transparency and full disclosure of all information.

Annexure-I

(To the Consultation paper on legal services-July 2006
prepared by the Department of Commerce)

1. Whether we are currently exporting enough legal services and what are the destinations of these service exports? Should we increase our trade in legal services so that Indian legal services professionals will get a pie of the US\$ 20 billion world trade in legal services annually?
2. What is the potential for the Indian lawyers if they want to expand their activities to get market access in other countries?
3. What are the area of potential for the kind of legal services in India with our globalization efforts? Are we in a position to meet these demands internally?
4. What are the constraints that Indian legal professionals are facing in providing their services to the WTO member countries of their interests? What are the most important methods by which our legal professionals want to reach out to their foreign clients?

5. In the future, which countries will be important export destinations for legal services? What type of legal services can be anticipated for exporting in the future?
 6. Can our Legal professionals anticipate that method of delivering services internationally will change?
 7. Do you think that partnering with foreign firms is an effective way to deliver services?
 8. What do Legal Professionals consider as priority concerns with respect to the liberalization of trade in legal services?
 - (i) "Buy-local" preferences, and /or (2) Investment limits or restrictions, and /or (3) Immigration/temporary entry restrictions, and /or (4) Limitations on the number of service providers in the market (*i.e.*, quotas, exclusive rights, etc.), and/or (5) Non-recognition of professional credentials, and /or (6) Lack of transparency of local practising/licensing regime, and/or (7) Restrictions on access to government procurement projects, and/or (8) Subsidies and tax incentives, and/or, (9) Licensing requirements, and/or (10) Qualification requirements, and/or (11) Restriction on the use of company names, and/or (12) Language requirements, and/or (13) Residency/citizenship requirements, and/or (14) Restrictions on fee-setting, and/or (15) Unfair bidding practices, and/or (16) Currency controls.
 9. Whether it is imperative to first create a liberalized regime domestically for the Indian Lawyers/Advocates before considering any form of liberalization? This would in effect allow consolidation in the legal profession, which allows Indian Advocates to attain global standards and would allow them to compete with the best of the best.
 10. Whether India should allow FLCs (Foreign Legal Consultant) or foreign firms in a phased manner, after domestic reforms are in place or not at all?
 11. If yes, what should be the structure of their presence: a joint venture or a staged liberalisation?
 12. What would be the areas in which foreign lawyers can advise, while strictly excluding court advocacy?
 13. What would be the role of the Bar Councils and that of the regulatory body in the home country of the foreign lawyer?
 14. How would issue of liability and consumer welfare be handled in case involving foreign lawyers?
 15. What should be a logical response to the various requests made on us at the WTO (**Annex 3**), including in the ongoing plurilateral negotiations?
 16. Are there certain areas where internationally liberalized market access in India will have a significant impact on Indian firms? What will be this impact and how large will it be?
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Restrict Foreign Access to the Bar

*This article was published in the Hindu on March 21, 2013.
There has been a persistent demand by foreign lawyers to be
able to practice in India. The bureaucracy favours them.
A dubious attempt by top foreign law firms is the subject of
Bombay High Court judgments. A court-monitored model,
as in many other countries, is advocated.*

“The Economic Survey has strongly batted for the removal of the restrictions on foreign direct investment (FDI) in legal and accountancy services” (The Hindu, February 28, 2013). Opening up the legal services sector for foreign lawyers is being debated for over 18 years. Predominantly, foreign law firms want to practise as consultants (FLCs) and not in court. Government apathy, unthinking bureaucratic support to foreign law firms, total disconnect with the legal profession, absence of national policy objectives and dubious behaviour by foreign law firms in the past have clouded the whole issue.

Delhi Bar Council Challenge

In 1994, Michael Fysh QC appeared before the Delhi High Court to argue a case representing a multi-national company. An objection was taken by the Bar Council of Delhi challenging his right to appear. This incident catapulted the controversy nationally.

The Bar Association of India (BAI), the premier voluntary association of lawyers functioning for over 50 years, immediately reacted as far back as October 5, 1994. A resolution for setting up a Task Force and a High Powered Committee was suggested. The plea fell on deaf ears.

The Bar Council of India consistently passed several resolutions between 2002 and 2007 opposing the opening up of the Indian legal profession to foreign lawyers or foreign law firms while emphasising the absence of specific proposals by the Central government, and has recorded a desire to continue a dialogue and interaction with the Government of India.

The General Agreement on Trade and Services (GATS) emphasises the right of members to regulate trade and services. Briefly, the core concepts of GATS are non-discriminatory and equality of treatment of all members. In an Annex

on Movement of Natural Persons, an exception is carved out offering a clear impediment to Indian professionals working abroad.

Bombay Litigation

Three large international law firms viz. White & Case, Chadbourne & Parke and Ashurst Morris Crisp applied to the Foreign Investment Promotion Board (FIPB) for starting branches in India. Their applications were rejected.

Thereafter, they successfully applied under the (now repealed) Foreign Exchange Regulation Act 1973 (FERA) for a licence or permission to open a liaison office under Section 29 for “carrying on any activity of a trading, commercial or industrial nature.” They surprisingly did not apply under Section 30 “to practise a profession or occupation.”

A disingenuous stand by high-ranking professional firms through a dubious route. They leveraged their position by employing the kin of powerful serving and retired bureaucrats. The *Indian Express* was more to the point — “The first set of clearances was granted after a delegation of foreign law firms, under the leadership of the son of the Union Minister of Law, met officials of the RBI.”

An NGO called ‘Lawyers Collective’ filed and succeeded in a public interest litigation (PIL) in the Bombay High Court challenging these permissions.

The legal profession and the public owe a debt of gratitude to the crusading and dedicated efforts of Indira Jaising, Anand Grover and, later, Chander Uday Singh representing the “Lawyers Collective” which exposed the attempt of the foreign law firms to gain a backdoor entry with government support in the lucrative legal services sector by bypassing the Advocates Act.

Most countries, including Australia, Hong Kong and South Korea, prohibit foreign law firms from practising domestic law and also provide for registration under strict regulations for practising foreign or international law.

A case that is referred to in the Bombay judgment arose in the New York Court of Appeals. One Lorenzo Roel started practising Mexican law in New York and contended that as his practice was restricted to Mexican law, he did not practise law in New York. This contention was rejected. The Court held: “... Whether a person gives advice as to New York law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice ...”

In the final judgment (Swatanter Kumar CJ and J.P. Devadhar J.) delivered on December 16, 2009, the *prima facie* view expressed at the interlocutory stage by Chief Justice M.B. Shah and Justice S.H. Kapadia (later CJI) was confirmed. The Bombay High Court held that “the Reserve Bank of India was not justified in granting permission to foreign law firms to open liaison office in India under Section 29 of the Act” and that practising the profession of law under the Advocates Act covered both litigation practice as well as “persons practising in non-litigious matter”.

Nothing could be clearer. Practice of foreign law was covered as non-litigious practice under the Advocates Act. The judgment has not been appealed from and has reached finality, and binds the government.

Madras Litigation

Later another petition (PIL) was filed in the Madras High Court by A.K. Balaji. The government contended before the Madras High Court that "the Bar Council of India, which has been established under the Advocates Act, 1961, regulates the advocates who are on the rolls but law firms as such are not required to register themselves before any statutory authority nor do they require any permission to engage in non-litigation practice."

This is directly contrary to the Bombay judgment which is binding on the government. The Madras High Court while following the Bombay judgment surprisingly deviated from it and made several concessions to the benefit of foreign lawyers which were vigorously supported by the governmental authorities. The Bar Council of India has appealed to the Supreme Court. By an interlocutory order, the Court has only permitted foreign lawyers to visit India for a temporary period on a "fly-in and fly-out" basis for the purposes of giving legal advice to their clients in India regarding foreign laws. In the absence of strict monitoring, this exception is likely to cause grave abuse.

The Law Commission of India, in a working paper in 1999, raised pertinent issues and concerns while recommending amendments to the Advocates Act to prepare a level-playing field for Indian lawyers.

Government Apathy and Opacity

On September 20, 2004, the U.K.-India Joint Declaration was made in London. The U.K.-India Joint Economic and Trade Committee (JETCO) was set up to provide recommendations on the possibility of opening up legal services in India. It appears that reports were made by the two teams but they are not in the public domain. It is understood that during the JETCO meetings, some Indian delegates were unequivocally informed by the U.K. team that they would emasculate Indian firms and pick and choose the attorneys from Indian firms so as to destroy capabilities and create their own strengths. U.K. firms had no interest in joint ventures with Indian firms which could help assimilate new technologies and know-how and training. It is however gathered that thereafter no significant progress has been made.

The Society of Indian Law Firms (SILF), which consists of firms which specialise in Joint Ventures, international arbitrations and transactional practice, had this to say: "The demand for opening legal services sector in India does not come from Indian business or Indian profession or even foreign multinational companies. Strangely the demand comes from foreign lawyers and particularly those from the U.K. ... The problem is that in India the legal profession is not a business and it is not up for sale."

It is time a resolution to this contentious issue was arrived at. The ball lies in the government's court. It must start a frank and meaningful dialogue by publishing a position paper containing the national objectives and a proposed mechanism.

In sum, reciprocity, transparency and accountability of foreign lawyers with strict court-monitored mechanism of disciplinary control (one cannot trust the executive in view of its consistent support to foreign law firms) and a level-

playing field are essential to be put in place by law. Our law firms should not be eliminated in India as has happened in the accountancy sector but should grow nationally and internationally. A *modus vivendi* between the legal profession and the authorities is a precondition for fashioning a meaningful mechanism. Foreign Legal Consultants (FLCs) and foreign lawyers being permitted to enter the legal services sector in India without these safeguards would be unacceptable, inopportune and contrary to national interest.

63

The Bar – What it has Taught Me

*This is a convocation address by the author delivered on
18th May, 2014 at the First Convocation of the
National Law University, Odisha*

I

I consider it a great honour and privilege to be invited to deliver the First Convocation Address of the National Law University of Odisha.

The first Convocation is a unique and unforgettable moment in the life of this University.

I feel especially honoured to have been invited because I hold no public office and no prestigious position.

I have always been and continue to be a lawyer and an advocate. I consider myself as an equal to any lawyer anywhere in India.

It is a pleasure to have on the podium distinguished personalities whom I have known some at the Bar and some on the Bench. Your Vice Chancellor I have known since his days in the National Law School University Bangalore.

II

I have listened to many Convocation addresses as an invitee - they are traditionally full of solid and weighty advice to the young graduates. As a result they are also uniformly boring.

I will attempt to break that pattern and not bore you too much.

I will share with you the lessons I have learnt – and what practice at the Bar has taught me.

Friends, I was enrolled in Bombay as an Advocate on 12th November, 1951 and started practice in the Bombay High Court in January, 1952 – (over 60 years ago). I joined the chambers of M.L. Maneksha, Bar-at-Law, then at the height of his powers. Incidentally, Maneksha's first pupil (to appear in the Original Side (OS) Examination of the Bombay High Court) was none other than H.M. Seervai – the celebrated author of the Constitution and a long serving Advocate General of Maharashtra.

Maneksha had a remarkable memory and to appear with him as a junior required a mastery of all pages of the brief as well as the authorities to be cited. It was always a tough and rigorous exercise.

To succeed in any profession – hard work, more hard work and still more hard work are essential. Genius, it is said, is 95 percent perspiration and 5 percent inspiration. Early days at the Bar are frustrating with little or no paid work but when success embraces you there is little time for other activities. A saying attributed to Rufus Isaacs a famous English lawyer runs “The Bar is never a bed of roses, it is either all bed and no roses, or all roses and no bed”

Rufus Isaacs occupied office as Attorney General later Lord Chief Justice of England and still later as Lord Reading became Viceroy and Governor General of India. At the height of his law practice he would regularly get up at 4 o'clock in the morning and come down the stairs of his home to his chamber on the ground floor. His young son enjoyed the good life and was an avid partygoer. He would return home at almost the same time. Rufus Isaacs remembered that his unhappiest moments were when his son regularly meeting him at 4 o'clock in the morning would invariably greet his father saying “Good morning father”. Rufus Isaacs would feel terribly depressed while responding “Good night son”.

III

Being briefed as a junior from Bombay enabled me to enroll in the Supreme Court on 4th December, 1958. My first case as a young junior assisting Purshottam Tricumdas in the Supreme Court was Madhubhai Amathalal Gandhi (AIR 1961 SC 21) which related to the de-recognition of the Indian Stock Exchange. The Bench was presided over by Chief Justice B.P. Sinha and comprised of Justices J.L. Kapur, P.B. Gajendragadkar, K. Subba Rao and K.N. Wanchoo.

Ladies and Gentlemen the present Chief Justice of India is the 41st Chief Justice. I have had the privilege of appearing before 35 of them, sitting as puisne Judges or as Chief Justices.

Purshottam Tricumdas had commenced practice in the Supreme Court after leaving the Bombay Bar. Purshottam Tricumdas was a fearless Senior Advocate. In *Vajravelu Mudaliar v. Special Deputy Collector*, (AIR 1965 SC 1017) and *N.B. Jeejeebhoy v. Assistant Collector*, (AIR 1965 SC 1096), which were heard together, the question involved was discriminatory compensation – more compensation payable under the Land Acquisition Act but less under a separate law for housing schemes. The challenge was under Article 14.

The Chief Justice, P.B. Gajendragadkar was to preside but he happened to be a member of a housing cooperative society which would benefit if the law was upheld as valid. Thus, there was a case of reasonable likelihood of bias. Most counsel were unwilling to offend a strong Chief Justice like Gajendragadkar by raising an objection. Purshottam Tricumdas appearing for a Bombay client had no such hesitation and raised the objection. Chief Justice Gajendragadkar was taken aback and appeared to be hesitant to recuse himself. However, C.K. Daphtary, the then Attorney General appearing for the respondents submitted that no party should have even a feeling of lack of impartiality in the highest

Court. Justice Gajendragadkar opted out from the case. Consequently, Justice K. Subba Rao presided and the petitioners succeeded. Seervai refers to this in Constitutional Law 4th edition Vol.2 Page 1736 footnote 77.

This example is a vital lesson for lawyers – the great courage displayed by a leader of the Bar and very astutely supported by the Attorney General C.K. Daphtary. It also demonstrates the upholding of the principle of recusal by Chief Justice Gajendragadkar.

My young friends, some of you may become judges, some of you will be practicing at the Bar, do not forget this inspiring example from the Bar and the Bench.

IV

Chimanlal Setalvad (father of M.C. Setalvad – the first Attorney General for India) was a doyen of the Bombay Bar - some time Additional Judge, leader of the Liberal Party, sometime Vice Chancellor of Bombay University for many years, member of the Legislative Council, member of the Hunter Committee (who cross-examined General Dyer) to inquire and report on the Jallianwala Bagh massacre. He writes in his autobiography "Recollections and Reflections" that his desire to take to the legal profession was stimulated by stories he had heard and the great independence and solicitude for the liberty of the subject displayed by the High Court and its predecessor the Supreme Court in Bombay.

Sir Edward West was the Chief Justice of the Supreme Court at Bombay and Sir Peter Grant and Justice Chambers were the other judges. The Court issued a writ of habeas corpus for production of one Moro Raghunath who was alleged to have been kept in custody in Poona and of Bapu Ganesh who was detained in the Thana jail both outside the Island of Bombay. The British Governor appointed by the East India Company refused to obey the writ, twice.

The Governor also sent a letter signed by him requesting that the court should not take further action. The Court ordered the Clerk of the Crown to record the government's letter and further directed that a reply be sent to government that no notice could be taken of their letter - "as it was most unconstitutional for government to approach the Court not by petition or by motion by themselves or by counsel in open court, that being the only way in which for the wisest purposes, the law permits judges to be addressed".

The Judges petitioned the King in Privy Council to resolve the matter. Meanwhile, Chief Justice Edward West had retired and Justice Chambers had died. On 1st April, 1829 Peter Grant announced that the Supreme Court at Bombay had ceased to function on all its sides and would remain closed and sailed for England.

The Privy Council decided that the Court had no territorial jurisdiction thereby upholding the government stand.

In the report of the Privy Council decision (1 Knapp 1 (PC) at 59 = (1901) 12 English Reports 222 at 243 (PC)) the Asiatic Register is quoted which reads - "Before this decision had been pronounced the Supreme Court at Bombay had

closed under the following circumstances After this reply, Mr. Justice Grant, on 1st April 1829, declared that the Court had ceased on all its sides and that he would perform none of the functions of a Judge until the Court had received an assurance that its authority would be respected, and its process obeyed and rendered effectual by the Government of the Presidency”.

In the Central Court of the Bombay High Court building a portrait of Peter Grant is prominently displayed.

This stand by an English Judge against an English Governor in favour of Indian subjects is a shining example of assertion of judicial independence.

The lesson for all of us is to preserve the independence of the Judiciary - a part of the basic structure of our Constitution.

V

It is said that out of 100 cases, 90 cases win or lose themselves and the advocate's presence makes little difference. Seven are lost by bad advocacy. Only three are won by good advocacy.

One of the greatest advocates India has produced was C.K. Daphtary, our Second Attorney General, a man of outstanding wit and wisdom.

Daphtary's wit and wisdom is part of the folklore of the Bombay Bar.

An often repeated story runs thus -

A judge recently elevated from the Bar to the Bombay High Court Bench was trying a case relating to share bazaar and stock exchange transactions. Daphtary who was appearing had lost a small fortune recently, playing on the stock exchange. So the judge repeatedly went on needling Daphtary saying that counsel knows more about the share bazaar and stock exchange transactions than he does and would Daphtary explain to him the intricacies.

Later Daphtary read out an authority and as the book was not available for the judge, he passed on the volume to the Judge. However, on the book there was a small bug and the judge remarked “Mr. Daphtary you have not only passed on the book but also a bug”.

As is customary a judge's joke has to be loudly appreciated and laughter rang through the court.

After the laughter subsided Daphtary responded - “My lord, recently, many a bug has moved from the Bar to the Bench”.

In another matter Daphtary had just returned to the Supreme Court after a long break as he had gone to represent India before the International Court of Justice.

Justice Hidayatullah was presiding and he said - Mr. Daphtary there is very little merit in your Special Leave Petition except that you are appearing before us after a long time. Daphtary promptly responded “why not celebrate the occasion by admitting it”. Hidayatullah laughingly granted leave.

A maximum result by a minimum argument.

VI

In June 1957, LIC Mundhra Scandal rocked Parliament. Life Insurance Corporation (LIC) was alleged to have bought Mundhra Company shares at inordinately high prices to oblige Haridas Mundhra. Government appointed Chief Justice M.C. Chagla of the Bombay High as a One Member Commission of Inquiry. Chagla insisted that the then Attorney General M.C. Setalvad should be appointed as counsel to assist the Commission.

Notwithstanding Prime Minister Jawaharlal Nehru's support expressed publicly in favour of the Finance Minister T.T. Krishnamachari, Chagla submitted a scathing report which blamed the Finance minister and other high officials. Setalvad assisting the Commission (though a serving Attorney General) also criticized the Finance Minister and other officials in his address. Consequently, the Finance Minister was forced to resign.

Setalvad was criticized in Parliament for acting contrary to the interests of government. However, there was much support for the Attorney's General stand because the object of the Commission was not to shield higher-ups but was to discover the truth.

Later, M.C. Setalvad writes in his autobiography 'My Life' that he happened to meet a former Attorney General of England Sir Frank Soskice who said that the part Setalvad had played was exactly what he would have done, had he been the Attorney-General." (M.C. Setalvad: My Life – page 292))

In his book "The Law Officers of the Crown" J. Edwards writes (page 301-302) – that the Attorney General in the Conservative Government addressing the Tribunal of Inquiry into the alleged Bank Rate leak, where the Chancellor of the Exchequer's integrity was impugned, declared - "I regard it as my clear duty to do all that lies in my power to assist you in your task and in the elucidating of the facts. It is my duty to act here, as in some other fields, without any regard to political considerations of any kind, and in discharging this duty I am not in the least concerned with – indeed I am completely indifferent to – political or personal results."

VII

In sum, the lessons I have learnt are, first, hard work;; Secondly to state the facts correctly and to never mislead the Court by misstating the law because a lawyer as litigator owes a duty to the Court – a duty higher and not in conflict with his duty to the client; Thirdly, always be respectful to the judge but never submit to inappropriate or derogatory remarks; Fourthly, integrity and honesty – no compromise on basic principles; Fifthly, accommodation and courtesy to your opponents and courteous treatment of opposing counsel, which will earn respect from your peers, colleagues and contemporaries; Finally, study legal literature and biographies of great lawyers. Lord Denning's trilogy – "The Due Process of Law"; "The Discipline of Law" and "Landmarks in the Law" and N.A. Palkhivala's books – "We the People" – "We the National" are rewarding.

Auto-biographies of great lawyers – will also inspire you – some come to my mind – M.C. Chagla “Roses in December”, M.C. Setalvad “My Life” and H.R. Khanna “Neither Roses Nor Thorns”.

VIII

Friends and young lawyers you are very fortunate. Fate has dealt you a good hand as compared to many others in this vast country. As lawyers you can render great service to the indigent and poor by not only taking up legal aid cases but espousing public interest causes on issues near and dear to your heart.

Above all, in developing countries it is the law’s function to provide a moral and intellectual basis to the quest for social justice. It is only if the legal system adapts itself, and changes and accommodates the aspirations of the people at the bottom of the social and economic ladder, that the law will fulfil its basic function, namely to maintain the inner order of a politically-organised society, preserve its continuity and lead to dynamic but peaceful social change.

Young graduates, your parents - your family and this University have given you outstanding education in this law school. Society expects you to give back something more to those who need your services.

IX

In our constitutional history, 9th December, 1946 was a historic day. The first meeting of the Constituent Assembly took place on that day and Dr. Sachchidananda Sinha, the oldest member and the oldest Parliamentarian in India was unanimously elected as provisional Chairman of the Constituent Assembly. In his inaugural speech he cited the great American jurist Joseph Story who wrote:

“Republics are created – by the virtue, public spirit, and intelligence of the citizens. They fall, when the wise are banished from the public councils, because they dare to be honest, and the profligate are rewarded, because they flatter the people, in order to betray them.”

These words from his inaugural address must continue to inspire and motivate us to uphold the great constitutional values reflected in the Preamble viz. Justice, Liberty, Equality, Fraternity in a Sovereign Socialist Secular democratic republic.

My generation of lawyers has left many knotty problems unresolved. It is for you, the new generation of young lawyers, to address them with character, with courage and with compassion.

I wish the young graduates good luck and great success.

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