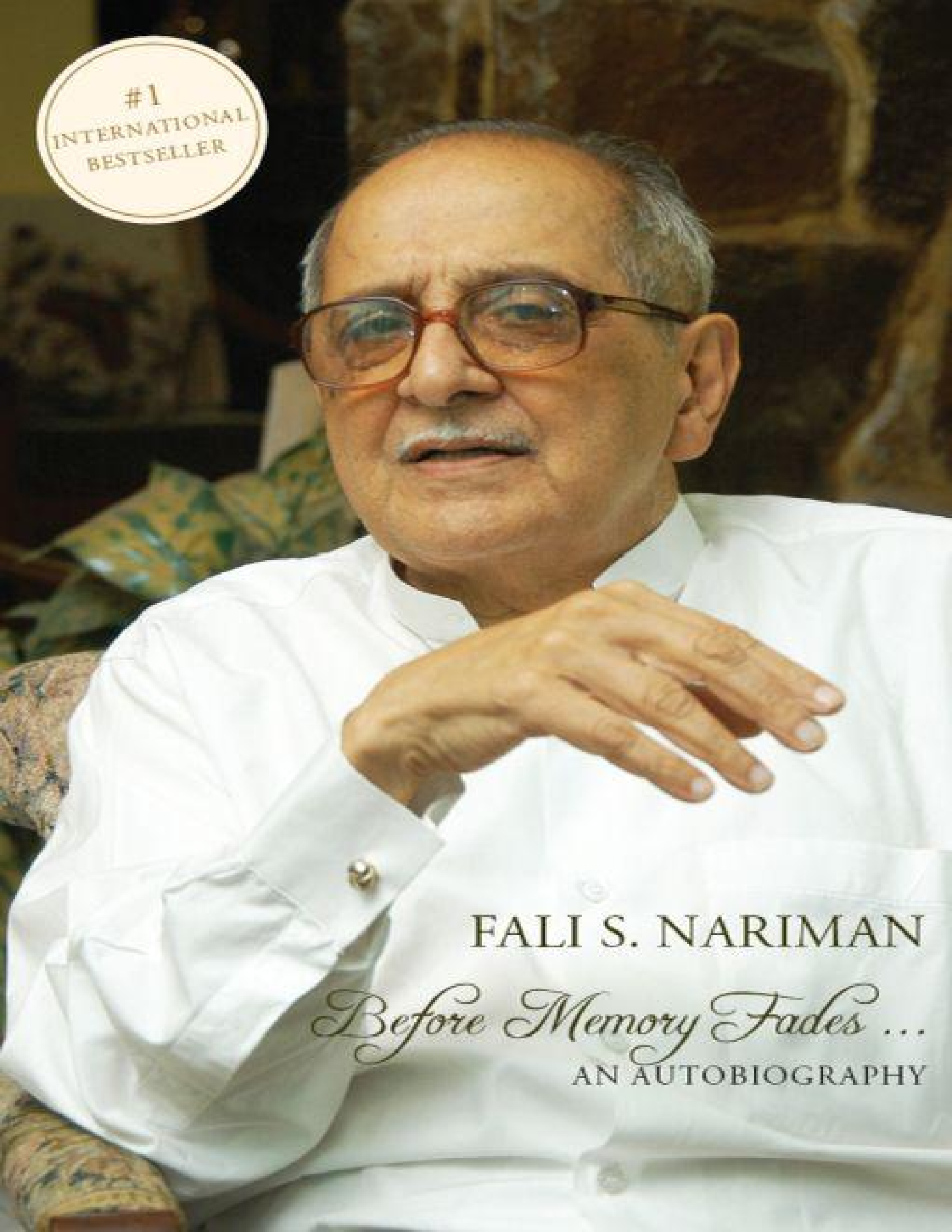
#1
INTERNATIONAL
BESTSELLER
FALI S. NARIMAN
Before Memory Fades ...
AN AUTOBIOGRAPHY

Praise for *Before Memory Fades* ...

Whoever has heard Fali S. Nariman … never ceased to be impressed by his eloquence, command of the language, and a flair for the apt phrase. All these attributes are at their height in his autobiography *Before Memory Fades* that is lucid, concise, witty and absorbing; … not just a good read, it is also a delightful one. For those who have anything to do with law—its formulation, enforcement or practice—it should be compulsory reading.

– India Today

Billed as "An Autobiography", Nariman's book is less a continuous narrative than a collection of reminiscences, anecdotes and reflections on the events and people that have filled his very full life—recounted with that ineffable charm, gentle persuasiveness and quiet humour that so charaterise the man. … There is much else—on the Emergency and its judges, on fellow-lawyers and court anecdotes, a brilliant chapter on river water disputes and engaging reflections on his tenure as a nominated member of the Rajya Sabha. I commend this easy and profitable read.

– Outlook

Over the decades Fali S. Nariman has attained the status of a pre-eminent advocate whose views are not only heard but also respected. This autobiography is informative, educative and thought-provoking. … It isn't the content alone that makes this book an endearing read. This autobiography is suffused with a rare warmth and modesty, a spirit of liberalism reflected in the willingness to seriously address rival points of view, and a scholarship that is worn very lightly. … All in all, a compassionate work written by someone who comes across as a compassionate man.

– The Hindu

Fali Nariman's autobiography … is a joy to read. No doubt the author starts at the beginning but it's not his life story he relates so much as an honest account of the important events that stood out in his life. … It is exceptional for two other reasons. … First, it deftly avoids the pitfalls most memoirs

inevitably hurtle towards and, second, it discovers the real secret of a delightful read. … He's not just the raconteur but the man in the middle too. An autobiography that makes you think. The author makes you engage with the book rather than simply read it.

– Hindustan Times

The book is brilliantly planned and beautifully designed. The 18 chapters, laced with quotations, anecdotes and series of vignettes … provide a glimpse of his jurisprudential wisdom. … It is a must not only for judges, advocates, students of law and political science, but also for editors, people's representatives, administrators, academics and all those who believe in the sanctity of constitutional values, the majesty of law and, above all, independence of the judiciary.

– The Tribune

What makes his autobiography very readable is the all-pervading sense of modesty and touches of humour.

– Khushwant Singh

Fali S. Nariman, the legal luminary, lifts the dark veil from the facts long shielded from public view in his autobiography *Before Memory Fades*. Nariman serves us shining examples of the exceptions, both of the bench and the bar.

– Business Standard

FALI S. NARIMAN

Before Memory Fades ...

AN AUTOBIOGRAPHY

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Dedicated to the memory of my dear parents
Sam and Banoo Nariman

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Acknowledgements

And we forget because we must
And not because we will

Matthew Arnold, ‘Absence’ (1852)

*T*he Scottish dramatist Sir James Barrie wrote that a safe but sometimes chatty way of recalling the past was to force open a crammed drawer: ‘If you are searching for anything in particular you don’t find it but something falls out at the back that is often more interesting.’*

It is in this ‘chatty way’ that I recall episodes from my life, commenting along the way on men and matters.

* In the dedication in *Peter Pan* (1902).

Chapter 1

The Great Trek

Our arrival in New Delhi marked the first turning point in my life – landing as a refugee from Burma, uprooted from hearth and home.

*I*n the first chapter of his autobiography (appropriately titled *Hearsay Evidence)*, G. K. Chesterton writes:

> Bowing down in blind credulity, as is my custom, before mere authority and the tradition of the elders, superstitiously swallowing a story I could not test at the time by experiment or private judgment, I am firmly of opinion that I was born on the 29th day of May 1874, on Campden Hill, Kensington.[1]

In imitation of the great and worthy, let me begin by saying that I have been reliably informed and brought up to believe that I was born on the tenth day of January 1929 at the General Hospital in faraway Rangoon (now Yangon, a part of the then British India).

I was also brought up to believe that our family name 'Nariman' and my father's name 'Sãm' had a Persian ancestry. 'Sãm, the mythical hero of ancient Persia, is an important character in Ferdowsi's epic, the Shahnameh.[2] Sam was Iran's champion during the rule of Fereydun, Manuchehr and Nowzar. The Shahnameh also traces the history of our Zoroastrian religion from its beginnings, up to the defeat of the last Zoroastrian king by Arab invaders. Secure in the conviction of my ancient Persian ancestry, I was surprised to receive a letter in May 2007 from my erstwhile colleague in the Rajya Sabha, Jairam Ramesh, who had just returned from a trip to Azerbaijan. This is what he wrote:

> Dear Fali,
> I was in Baku recently and saw a magnificent statute of Nariman Narimanov, a most distinguished Azerbaijan political leader. My Azeri counterparts were most tickled when I told them that one of India's

best known lawyers and one of India's most lovable public personalities is also a Nariman.

I would have liked to claim Nariman Narimanov as my illustrious ancestor but it was with a heavy heart that I wrote back:

> Dear Jairam,
> Many thanks for your useful information as to my ancestors hailing from Azerbaijan. But I assure you we were and are Parsi Zoroastrians (of Persian origin) hailing from India! But how sweet of you to have thought of me in such affectionate terms.

My mother's family (the Burjorjees) hailed from Burma (now the Union of Myanmar). My father, Sam Nariman, came to Rangoon from Bombay (now Mumbai) in the year 1927 to establish a branch office of New India Assurance Co. Ltd. Here he met and fell in love with my mother, Banoo Burjorjee (16 years younger than him). They married early in 1928, setting up home in Rangoon, where my father was posted as the company's branch manager.

As to how my mother's ancestors first came to Burma is a story of adventure. Since the early nineteenth century, my great-great-grandfather, from my mother's side, had settled down with his family in Calicut (Kozhikode) on the west coast of India. Before the year 1865 (when the first Indian Succession Act was passed), Parsi Zoroastrians living in India – like all other religious communities – were not enjoined to be monogamous. Menfolk could lawfully marry, and marry again.

Young Fali Nariman (*middle*) with his parents, Sam and Banoo Nariman, in the most modern car of the times (1932)

But when my mother's ancestor in Calicut decided to marry again, during the lifetime of his first wife, it was his sons (the Burjorjees of the second generation) who rebelled, and in protest they left home, setting out in a sailing boat, not knowing where they would land. Three months later, after much privation, they found themselves at the mouth of the Irrawaddy. Sailing up the river, they landed in the port of Rangoon. There they made good. Burma was ruled at that time by King Theebaw. The Burjorjee brothers soon ingratiated themselves with the ruler and even got to run the king's postal service for him! Theebaw was a cruel but colourful character. He became king after eliminating 30 other prior claimants! And he would brook no defiance from anyone, not even from God. It was said that when his favourite queen was lying dangerously ill, he commanded the *hpongyis* (the yellow-robed Buddhist monks) in the royal monastery to pray to God that she gets well. The monks did as they were bid, praying all night, but the queen died. King Theebaw then ordered his troops to raze the monastery to the ground. He was the last king of Burma, defeated by the British in December 1885, in what is described in history books as the Third Burmese War. With his dethronement and deportation, Burma (like India) became a part of the British Raj.[3]

I grew up in Rangoon (then capital of Burma) in the 1930s under the loving care of my parents (I was their only child). Spoilt? I am afraid so; I was always 'Baba' to my parents. We lived in a rented doubled-storied bungalow (Kennedy House) near the Royal Lakes. I can truthfully describe my childhood as 'a cloudlessly happy one'. The clouds gathered, but only later when I was 12 years old in December 1941, when the Japanese bombed Rangoon and then invaded and quickly conquered Burma. When I was five, I was thrilled to take part in a children's programme broadcast over All Burma Radio – it was not a speech or a poem, but a catchy tune called 'Rendezvous'. I did not sing or play it – I *whistled* it. I believe it was a hit, but I have had no requests since then to whistle catchy tunes! Another early recollection is when I was six years old in standard I of a coeducational school. The principal (an imperious lady, Miss Hardy) announced one morning at assembly that King George V had died. She then

added that she had been instructed to declare a holiday, at which there was loud cheering. Miss Hardy promptly revoked the declaration of a holiday, as a result of which the school was fined a substantial sum by the director of education! And we all whispered under our breath: 'Serves her right'. After a year, I moved on to a regular boy's school (The Diocesan Boys School) where the principal, L. S. Boot, was much less impetuous. Progressing from one class to another, a good student but of average ability, I reached standard VII where my class teacher was W. W. Rollins. And what an excellent teacher he was – his lectures in geography, illustrated with maps prepared by him, have left an indelible impression on me.

Nothing very eventful disturbed the even tenor of our lives in Rangoon – until Japan declared war on the Allied Powers after bombing Pearl Harbour on 7 December 1941. Within a week, the city was targeted by air attacks. We witnessed intense and incessant bombing, and spent more time in our makeshift air-raid shelter in the garden of our home than in our bungalow. Soon we moved north to Mandalay for what we thought would be a brief sojourn. This was on the advice of the then governor of Burma, Colonel Sir Reginald Hugh Dorman-Smith, who confidently told my father at one of his war council meetings: 'Don't worry Sam, we will get rid of the Japanese in a month of two.' My father was taken in by this assurance – how could the chairman of the War Council of Burma be wrong? But he was wrong – hopelessly wrong. Contrary to Dorman-Smith's expectations, the invasion by the Japanese Army was so swift and fierce that for us the road back to Burma's capital city was cut off.

We were then forced to embark on a long overland journey to India with what little we had carried to Mandalay: it included several boxes of office records (life policies and general insurance policies); the head office in Bombay greatly appreciated my father's thoughtfulness in saving these important documents. The overland journey to India lasted 21 anxious and eventful (but for me, also memorable) days, through forests by bullock-cart (which took about seven days), along the Upper Chindwin River by country-boat (for the next seven days), and then (for a week more) up and down steep mountainous terrain on foot and by *doolies*[4] till we reached the Indo-Burma border – all this without any travel agent's guidance or even a tour map to help us along the way! But not without excitement. When we were on the mountainous terrain we were providentially saved from being trampled to death by an elephant. The Bombay Burmah Trading

Corporation owned about 400 trained elephants who were used at Rangoon for removing logs of wood from forests in Lower Burma. These pachyderms were brought up north on account of the war, and were made to carry into British India the baggage of the corporation's senior staff (only the baggage of the sahibs). Our luggage was carried by Manipuri porters whom we picked up at the starting pointing of our trip. These porters were extremely scared of elephants. They would insist on waiting for a full hour after each cavalcade had passed. On one such occasion, after an entire group of 19 elephants had passed us, we resumed our journey on foot (and *doolies*). Fifteen minutes later, when we were on a straight narrow path with a deep ravine on one side and a steep hill on the other, we saw a lonely elephant trundling down without his mahout. The nimble-footed porters left our luggage on the narrow path and clambered up the trees on the hillside. But we had to stick as close as we could to the side opposite the ravine with my parents saying their prayers. They feared it was the end. Just then, the leader of the troupe (a young Englishman), who had trained the elephants, came back looking for the missing one. When the beast was just 30 yards from us, ambling down to where we were (and would have certainly trampled us), this good man seeing the plight we were in shouted in Burmese, '*Shamba! Shamba, pyam ba, pyam ba*' ('Elephant! Elephant, go back, go back'). Apparently something clicked in the recesses of the small brain of the trained elephant. He obeyed his master's call and turned around as he was commanded. We then implored the porters to pick up our baggage lying strewn on the narrow path, and quickly rushed-on. A few days later, the same young Englishman met us at a refugee camp in Imphal and told us that he had great difficulty in reining in the animal which had gone berserk.

In the trek out of Burma, apart from biscuits and sweets which my mother had thoughtfully stocked up for the journey, there was not much to be consumed by way of food. In early February 1942, we arrived at a refugee camp in Imphal where we ate our first hot meal after a three-week trek. It was here that we were given the sad news of Rangoon having fallen into the hands of the Japanese Army. There was no going back now. We took the train from Dimapur to Calcutta (now Kolkata), and from there another train to Delhi (happily it is still Delhi), where we stayed for a while with my father's old friend, Dady Cooper, and his wife, Rutty, who very kindly gave us shelter in their spacious bungalow at Barakhamba Road.

Our arrival in New Delhi marked the first turning point in my life – landing as a refugee from Burma, uprooted from hearth and home.

Then started the search for a school. Since my education had been interrupted (in the seventh standard), my parents had to look for and find a school that would take me in. Ultimately, I was admitted for the 1942–1943 term in the Junior Cambridge class of Bishop Cotton School (BCS) in Simla (Shimla), something which (these days) cannot be asserted too loudly, after reports that a serial killer in Noida (Uttar Pradesh) also passed out from the same alma mater! (But no matter – I passed out much, much earlier!)

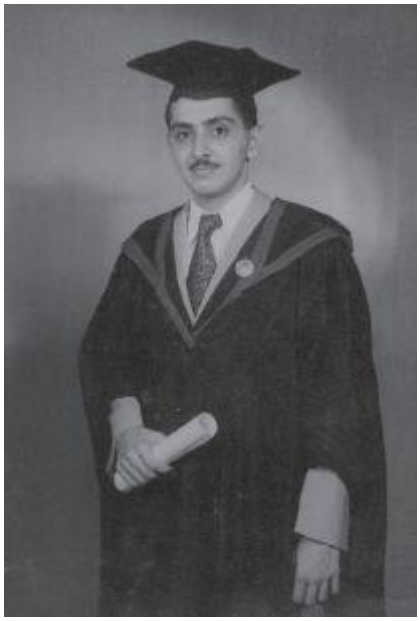
BCS was a Presbyterian school and we had a padre as principal. He was a canon in the ecclesiastical hierarchy – a step below a bishop. 'I am not a Canon that goes off' was his pet joke. Each year, Canon Sinker bid farewell to his students who passed out of school with the dismal words: 'My boys, I wish you all a life full of difficulties.'

At that time we all thought it was a cruel thing to say, and we even swore at him under our breath. But believe me, after nearly 80 years of experience in another school – the hard school of life – I am convinced that his words had the merit of wisdom. When you meet with difficulties early in life, the way in which you confront and overcome them helps to build your character.

Simla in those days was a salubrious hill station – exhibiting the last vestiges of pomp and pageantry of the British. One could not walk on the mall unless you had a coat on (bush shirts were taboo!), and no cars were permitted on the mall except that of the Punjab governor's or of India's commander-in-chief. It was also a beautiful hill resort – the sunsets in October (after the rains) were spectacular. The years 1942 to 1944 when I was in BCS were years of intense political activity in British India. As a consequence, I was fortunate to see (but not meet) – in Simla – Sir Stafford Cripps and other members of the Cripps Mission (1942); I also saw M. A. Jinnah being driven by rickshaw on the mall, properly attired in a three-piece suit. And one day, whilst walking behind Cecil Hotel, I saw Pandit Jawaharlal Nehru on a horse, trotting along at great speed. I quickly blurted out: 'Good morning Sir', and was delighted to hear his response – a loud and crisp 'Good morning'; and he was off. A rare glimpse of a great man.

Some of us students from BCS were taken (in the year 1943) to Viceregal Lodge to say goodbye to Lord Linlithgow who had the longest tenure as

viceroy in the history of the Raj. We went with enthusiasm, despite having to walk six miles from Chotta Simla, in expectation of being refreshed with hot cocoa and buns at the viceroy's residence. But no such treat awaited us. We were made to line up at the entrance of Viceregal Lodge in pouring rain, and were treated to the sight of the Noble Lord trundling down in his Rolls Royce. All he did was wave to us. I must confess that, tired and exasperated as we were, we roundly swore at him. That was our tryst with Victor Hope (family name of the Linlithgows). The Hopes were a large brood and the story goes that once having to sit with his kith and kin listening to a long and tedious sermon by the bishop of Calcutta (who attacked Linlithgow's attitude on home rule for India), the viceroy had to also listen to the final peroration of the bishop who, gesturing at the Viceregal pew said, '… and all we have left is an army of blasted hopes'.[5]



Fali Nariman in full academic dress
with his degree of Bachelor of Laws

After spending two, not-very-happy years in boarding school (I was a bit of a namby-pamby in those days) I left BCS, passing out with a first class in my Senior Cambridge examination. And quite proud of it. Admission was then secured in the first-year arts class of St. Xavier's College, Bombay – a Catholic institution with (mainly) Fathers of the Society of Jesus as our teachers; I spent four years in St. Xavier's College (1944–1948) and graduated from there.

The hallmark of a great educational institution is whether after more than 50 years you can still remember with gratitude those who taught you. I can, and I do. I recall with admiration and affection three outstanding teachers of my time: Rev. Father Duhr, SJ; Rev. Father Heras, SJ; and Rev. Father Gense, SJ – all of whom lived and lectured in India, and in the fullness of time, died in India. I also have nostalgic memories of Rev. Father Fell, SJ.

The tall and erect Father Duhr lectured us every week on world history in the first-year arts class for a full hour! With a booming voice that reverberated through the entire Lecture Room V (a hall accommodating several hundred students) and even beyond, we were treated to an intellectual feast of the names and deeds of Babylonian and Persian kings, and Indian potentates; and of the thoughts and sayings of the great philosophers and poets since the dawn of civilization. And we listened to him spell-bound, sometimes making notes, sometimes not. Duhr was born to a princely family in Luxembourg. After receiving the divine call at age 19, he abandoned his home and joined the Jesuit Order. When he lectured to us in the 1940s, he had already mastered eight different European languages, and he could teach in five of them (which meant that he knew the literature of these five languages). Although entirely European in upbringing, Father Duhr's heart was in India. He always told us that he would like to be buried in Sewri (the cemetery in Mumbai where good Christian souls were interred). It was not long after I left college that I heard that his wish had been granted.

Rev. Father Heras was a familiar figure to generations of Xavierites. He had long silken-white hair and a long silken-white beard, and looked like a minor prophet from the Old Testament – or more appropriately, like a rishi from the Himalayan snows! A historian of the Indus Valley Civilization, it was Father Heras who first deciphered the script of Mohenjo-daro. He was one of the very few historians who maintained that Mohenjo-daro (which means the 'City of the Dead') was Dravidian in origin, and not Aryan. Father Heras was brilliant but soft spoken, and my wife and I had the good fortune to meet him again on our honeymoon in October 1955 in that beautiful Jesuit seminary near Kodaikanal in South India, where we reminisced about the past. By December, in the same year, he was gone.

Rev. Father Gense was of a different type. A writer of history books, he walked with an awkward gait and wore on his head, at a rakish angle, what looked like a Parsi prayer cap! When we crossed him in the corridors of St.

Xavier's, we greeted him with, 'Good morning Father; how are you?' We always got a stock reply (with a giggle and a chuckle), 'He-he; like the British Empire, I am slowly disintegrating.'

Rev. Father Fell, who was a cousin of Father Dhur (and proud of it), was of a different sort. He had a quaint sense of humour – in fact he had his big laugh on me! He taught French to the first-year arts students (each first-year class had 400 boys and girls). We all had to sit in class according to our numbers – the girls separated from the boys. Since I was from Burma, and not too familiar with French, I was made to sit first in the boy's row! My number was '308'. My classmates remember the number because of a memorable taunt! Father Fell always plied us with difficult questions – addressing us by our number, never by our name! And he invariably picked on me. On one occasion when I was asked to parse[6] the French word 'apprendre', I looked totally blank and could not answer. So in theatrical fashion, Father Fell threw up his hands in despair and said in a loud voice, 'No. 308! Tell me – where did you go to school, man?'

I was just 15, fresh from a public school – having passed out with first class honours, so I puffed up my small chest and proudly said, 'Bishop Cotton School, Simla'. Back came the reply, 'Simla! But man, why did you have to go so far to learn so little?'

I had completely forgotten this taunt until some years ago, when one of my best and oldest friend, Russi Lala, 'refreshed' my memory of a convenient lapse! It shows how human memory plays truant. We sometimes forget inconvenient things said about us, and 'remember' things that did not happen at all (but more of that later).

I look upon Father Fell's reproach with grudging gratitude, because this was when I received my first basic lesson in life – not to show off. If you do not acquire the fine art of suppressing your ego when you are young, it will surely overtake you when you are older, after which it will become an incurable disease. What is worse is that you will also become a bit of a bore. Human beings are not born humble, and the tendency to show off is congenital, but it has to be suppressed. I do recall, with fondness and affection my college teachers, who inspired me to work hard and to keep my ego strictly under control.

Fali Nariman (*bottom left*) with his college friends

The great thing about education is the teacher–student relationship. It forms an invisible bond, especially where the teacher is one who has inspired you during your college days. Teachers deserve to be remembered, especially when they have been proficient. I was fortunate to have excellent teachers, and looking back, many of us from St. Xavier's remember them for their wisdom, wisecracks and foibles. Teachers should have a proud place in society. In India, regrettably, they do not – as exemplified, by what I chanced to witness a few years back in Delhi. A wizened old man driving his 1938 Austin at a speed under 20 mph with a sign at the back of the car reading, 'Please overtake me – as all my students have.'

Pathetic, but how true!

I passed out from St. Xavier's College with BA (Hons.) – not first class but second class, with history and economics as my principal subjects. My father, who always thought much of me, advised me to appear for the prestigious Indian Civil Service (ICS) examination, which in those days was conducted only in England. But I declined. I knew that my father could ill-afford the expense of my going to London. In those days, unlike today, there were few options for a second-class arts student, particularly one not conversant either with mathematics or any of the sciences. The last refuge for such a student was to take his chance with the law – which I did. I joined the Government Law College in Bombay.

I greatly enjoyed my two years (1948–1950), and a little more, at this century-old institution of legal learning, principally because of three part-time lecturers, all of who were practising lawyers at the Bombay Bar – Yeshwant V. Chandrachud (later to become chief justice of India,), Nani Palkhivala and Jal Vimadalal. One did not learn too much in law colleges in those days, but with these part-time lecturers our batch had imbibed not just legal knowledge but (more importantly) an enduring love for the law. Sir Jamshedji Behramji Kanga (JBK), who was to become my senior – about whom more later – would tell us freshers at the Bar that a lawyer never stops learning the law. For me, the passionate desire to keep learning the law was inspired, in no small measure, by the quality of the tuition given by these three great law teachers. I have said that I enjoyed my two years and a 'little more' at the Government Law College. The 'little more' was the period of about nine months after my second LLB when I was named a Fellow of the college, and had the privilege of giving a series of lectures to the students. It was quite a novel experience for me to stand on the stage and 'talk-to' a class! I do remember an occasion when M. R. Jayakar, privy councillor, came and spoke to us in the college. He told us that Lord Greene (formerly Sir Wilfred Greene), then master of the rolls (MR),[7] had said to Jayakar that in England when a barrister is asked to become a judge, he does not refuse, nay – he cannot refuse! We had the same tradition in Bombay till about the 1970s, since when the cost of living having gone up and salaries of high court judges having remained constant (Rs. 3,500), more and more prominent lawyers doing well at the Bar felt constrained to decline offers of 'elevation'.

To choose a career wisely, when you are in your teens or early twenties, is a very difficult decision, and possibly more difficult today when there are so many avenues that beckon. I recall the story of Sir Dinshaw Mulla, one of India's eminent jurists – a story that has always impressed me with the need to be frank, even if it hurts. When Mulla was in college studying English literature, he used to write poems; worse, he even fancied himself a poet. So, after he graduated with a BA (literature), he thought he would write poetry for a living but someone advised him to take up law. Being in two minds, he picked up pen and paper, and quite impetuously wrote a letter to the then poet laureate, Lord Alfred Tennyson (1809–92), enclosing a few of his choicest pieces. Mulla anxiously waited for a reply. In those days, letters to England went only by sea. Then, sure enough, one day he received

a frank response from the great man himself, written in his own hand: ‘Dear Mr Mulla, I have carefully gone through all your poems. I think you should try the law.’ What graciousness – a famous poet replying in his own hand to an unknown fellow way out in India. And what invaluable advice! Imagine, if Tennyson had said (just to please the young Mulla) that he should continue writing poetry, India would have lost one of its greatest jurists. Mulla went on to become law member in the Viceroy’s Executive Council, and in the early 1930s he was knighted and appointed privy councillor (a member of His Majesty’s Privy Council in England).[8] He was the great Indian jurist of pre-independence days. His commentary on the Code of Civil Procedure, 1908, indispensable (even now) to every practising lawyer, is in its seventeenth edition (2007). It was Sir Dinshaw Mulla who expounded, in simple elegant prose, the personal laws of Hindus and Muslims in his treatises on Hindu Law (now in its twelfth edition, 2007) and on Mohammedan Law (now in its nineteenth edition, 2001).

After the end of the Second World War, my parents went back to Rangoon (in 1947), with my father resuming his position as branch manager of the New India Assurance Co. Ltd. I used to visit them annually during my college holidays. I remember going to Rangoon (via Calcutta) every single year (till 1962) in the spacious double-decker seaplanes of the BOAC (British Overseas Airways Corporation), which took off from the Hooghly River and landed on the Irrawaddy in Rangoon. In those luxurious days, the BOAC flight from London to Jakarta, which included halts in Calcutta and Rangoon, took four long days with night stops, since there was no flying at night! My father suddenly died of a heart attack in December 1962 and was buried in the Parsi cemetery in Rangoon. My mother stayed on in Rangoon for a few more years, and later, in 1969, came to live with us in Bombay. When she left Rangoon, she had our possessions packed in ten cartons and took them to the airport. After having paid the extra-luggage charge, the customs authorities would not let her take it with her on the flight out! And so, the Narimans left behind in Burma – for the second time – the few possessions they had gathered over the years.

Notes and References

1. *Autobiography* by Gilbert Keith Chesterton, Twentieth Impression, Hutchinson & Co. (Publishers) Ltd., London (1937).

2. He was the son of Nariman, grandson of Garshasp, and father to Zal. He was Iran's champion during the rule of Fereydun, Munchehr and Nowzar. The name 'Sâm' is equivalent to the Avestan name 'Saama', which means dark, and in Sanskrit 'Shyaama', which means the same. (Source: Wikipedia)

3. The British Raj extended over all regions of present-day India, Pakistan and Bangladesh. In addition, at various times, it included Aden Colony (from 1858 to 1937), Lower Burma (from 1858 to 1937), Upper Burma (from 1886 to 1937), British Somaliland (briefly from 1884 to 1898) and even Singapore (briefly from 1858 to 1867). Burma was directly administered by the British Crown from 1937 until its independence in 1948.

4. A *doolie* is a frame suspended by the four corners of a bamboo pole and carried by two or four persons.

5. From Wikipedia

6. Parse: An old English word of doubtful origin used in my time to describe a word in a sentence grammatically by stating the part of speech and its relation to the rest of the sentence. Grammar is not taught any more either in English or French schools.

7. In England, the master of the rolls presides over the court of appeal.

8. The Bombay High Court had been represented on the Judicial Committee of the Privy Council by three distinguished judges and four eminent counsel. The judges were Sir Richard Couch, Sir Lawrence Jenkins and Sir John Beaumont; the first was chief justice of the High Court of Calcutta and the other two were chief justices of the Bombay High Court. The lawyers who practised in the Bombay High Court before they were appointed to the Judicial Committee of the Privy Council were Sir Andrew Scoble,

Sir George Lowndes, Sir Dinshaw Mulla and (after him) M. R. Jayakar.

Chapter 2

More Watching than Pleading

When you mention a famous race horse, they always ask you, 'From which stable?' The stable is important. It establishes the ancestry and the breed. When you name a lawyer who has done well, people ask you, 'From which chamber?' The chamber is important. It establishes the hierarchy and cultural tradition in which the lawyer has been reared.

The next turning point in my life was when I joined the Bombay Bar in November 1950. It was in the year before that that the Constitution of India was formally adopted (on 26 November 1949 – now celebrated by the Bar in Delhi as Law Day).

Life is full of surprises. Whether you do or do not believe in destiny or in Providence or in God, be sure that – out of the blue – some stranger, some unknown person, at one time or another, will reach out and give you a helping hand as you journey along on the rough roads of life. I had no 'godfathers' in Bombay. But God helped. My father spoke about me to A. D. Shroff of Tatas. Shroff was the chairman of the New India Assurance Co. Ltd. – my father's boss. He, in turn, spoke to Dinsha Daji, seniormost partner in Payne & Co., a leading solicitor's firm in Bombay, and I was permitted to sit there as a trainee. After working for a year (1950–1951) as an apprentice with Kaikobad Lala, one of the senior partners of the firm, Dinsha Daji (a fine avuncular old gentleman) very kindly helped me to secure entry into one of the most prestigious 'chambers' in Bombay – the chambers of Sir Jamshedji Kanga, whom he knew personally. This was the most important prop to my professional career.

Kanga's chamber was in the high court building – a magnificent structure built between the years 1871 and 1878 at a cost of only Rs. 16,44,000 which was less than the budgeted estimate – a fact proudly recorded in the marble plaque near the entrance on the ground floor. The architect of the high court building has depicted different impressions of *Justice* in carvings on the stone façade. The first is the British (Victorian) ideal. The second is a representation of the Indian ideal of justice. And the third is that of a cynic and realist, who treats justice as a commodity bought and sold in the marketplace by hard bargaining! In the Victorian model, justice is depicted (in stone) as a lady in a flowing gown. She is standing with a blindfold over

both her eyes. In her up-raised right hand she holds a sword, which threatens the wrongdoer with dire punishment for his wrongful conduct. In her half-raised left hand Lady Justice holds a pair of scales, so as to weigh the evidence led by the contending parties before the court. The Victorian conception is based on the assumption that justice is blind, that she performs her task without fear or favour, and does not go by the appearance of the parties arraigned.

The doyen of the Bombay Bar,
Sir Jamshedji Kanga

> The inherent flaw in this depiction is how do you see which way the scales of Justice tilt, if your eyes are blindfolded? How do you wield the sword of punishment with your eyes deliberately closed? In your blind fury for doing justice, you might strike at the innocent party and not the guilty one! And, the delay involved in the process of arriving at a decision will freeze the right arm and shoulder of Lady Justice, as also her left elbow, holding aloft the sword and pair of scales.

This Victorian (and traditional) ideal of justice is taken from the border-design of the Royal Charter signed by Queen Victoria which first established the high court at Bombay in 1862. The original charter is (till this day) kept in a special box in the office of the Prothonotary and Senior Master of the Bombay High Court.

The second depiction of justice – in stone – is based upon the Indian experience of what true justice ought to be. Here again, the architect has

been imaginative, portraying justice as a lady in flowing robes with a sword in her right hand and a pair of scales in her left hand. But there are significant points of distinction between the Victorian and the Indian ideals. Standing in front of the Gothic building of the Bombay High Court, opposite the Oval Maidan (at Churchgate), one can see two tall conical towers above the porch. The northern tower depicts the Indian ideal of justice, while the southern tower depicts the figure of mercy, the handmaiden of justice. In this Indian ideal of justice, the lady is not blindfolded.

> With clear eyes (and clear head) Lady Justice sees things with unbiased vision, looking intently at the ever tilting scales held in her left hand. She holds the hilt of the sword in her right hand. The tip of the sword is resting on the ground near her feet, so that her right arm and shoulder are not frozen stiff by the necessary delay involved in the trial. After considering the evidence, Lady Justice is left free to wield the sword swiftly, and strike the guilty party. Being clear eyed, she cannot by mistake or accident strike the innocent!

The architect and designer of the Bombay High Court building not only had an acute sense of perception, but a sense of humour as well. One has to be an astute observer to discover this. At the base of the tower depicting justice, is carved the face and front paws of a monkey! The monkey looks in the direction of the high-ceilinged central criminal court room located on the second floor of the high court building. The monkey wears an expression of wide-eyed horror, as if to convey feelings about the terrible things being perpetrated in the court room upstairs in the name of justice! Below the tower depicting the figure of Mercy is carved a ravenous wolf ready to tear up the unfortunate accused who is being tried in the central criminal court. What imagination!

Besides all this, the architect has created on the façade at least six figures of justice in caricature depicting human failings in the ideal of justice. The judges are depicted wearing judicial robes and bands. They also hold in their hands the sword to mete out punishment and the pair of scales to weigh the evidence. On their faces are bandages. The faces, hands and postures of the judges in caricature are also significantly different from their human counterparts. The judges are seated in their seats of judgment. They

hold their scales of justice in their right hand, and sword in their left hand. The scales hang beside their knees, already in a tilted position. The hilt of the sword is held in the left hand, but the bandage on the face is askew, leaving one eye shut and the other eye open.

> The facial expression is that of a person – seemingly drunk, with power, liquor or corruption (you can take your pick) – grinning away with sly satisfaction. Did the architect (and designer of these images) anticipate the decline and fall in judicial standards in course of time, or did he only portray the justice delivery system during the entire course of human history?[1]
>
> We shall never know!

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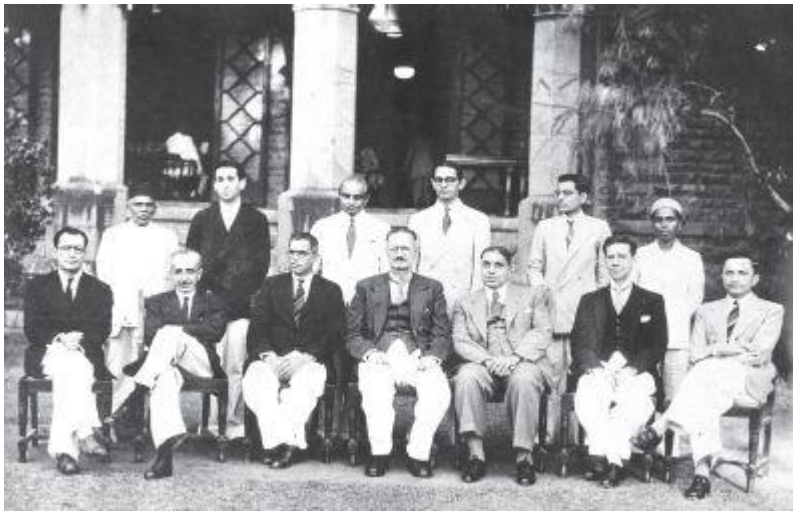
It was on the ground floor of this majestic high court building that Kanga's chamber was located – when I joined it in 1951. It was about 45 feet long and 18 feet wide with a large verandah at one end. There were seven tables in the chamber. The first four were large tables on one side of the room. The first table was, of course, for Sir Jamshedji Kanga, whom we youngsters always addressed as 'Sir Jamshedji', while the seniors called him 'Jamshedji'. In other chambers, the head was called only by his surname – even by the juniormost member. I remember Reginald Mathalone (a senior colleague at the Bar and a dear friend) telling me that in the chambers of Sir Dinshaw Mulla (great jurist and privy councillor), the juniors all addressed him as 'Mulla' – it was an old English tradition. When Mathalone took the Bar exams in London, he 'devilled'[2] for a few months with a QC (Queen's Counsel). The latter had once sent him off with a message to be delivered to the most renowned criminal lawyer of the time, Sir Edward Marshall-Hall.[3] Mathalone, duly attired in wig, collar and bands, entered the chambers of the great man addressing him as 'Sir'. The old boy cut him short, 'Young man you are a barrister and as a barrister you must address all members of the Bar, howsoever senior, by their surname, with no prefix. Just call me Hall!'

Next to Kanga's table was the table of Marzban Mistree. Years later, one of Marzban Mistree's enterprising juniors, Sam Phiroze Bharucha, became a judge in the high court and later transported to the Supreme Court to become (in November 2007) chief justice of India! The next table was that of Rustom J. Kolah (my immediate senior when I joined the chambers). His practice, then, was exclusively in the labour and tax courts and tribunals. Finally, there was the table of Hormasji Maneckji Seervai, in the far corner of the room. He was (later) to become well-known as India's great constitutional lawyer. On the opposite side of the room, there were three much smaller tables for the then relatively younger members of the chamber including one for Khurshedji Hormasji Bhabha (whom I later joined; I owe a lot to 'Khurshedji' as he was affectionately known; I learnt a good deal from him – both about law and legal practice). A couple of years after I joined Khurshedji, Soli Sorabji entered Kanga's chambers, also under Bhabha's pupilage; for a long while we were rivals, later un-friendly rivals, but now, in the evening of our lives, we are friends. Soli has had a most distinguished career, going on to become India's attorney general (on two occasions – first in 1989 for a year, and again in 1998 for five years; the only attorney general of India to emerge from the chambers of JBK. Then there was the table of Nani Palkhivala (later, to become India's most distinguished advocate). And next to his was the table of Jal Vimadalal (later to become a judge in the Bombay High Court) known for his bold judgments during the Emergency of June 1975. Vimadalal was transferred by diktat of the then chief justice of India (on the prompting of the government of the day) to the Andhra Pradesh High Court, where he became very popular with members of the Bar for even-handed justice.



Members of Sir Jamshedji B. Kanga's chamber in 1949,
before Fali Nariman joined
Seated (*left to right*): Naval K. Gamadia, Rustom J. Kolah, Oka, Sir Jamshedji B. Kanga, Marzban J. Mistree, Homi M. Seervai and Jal R. Vimadalal
Standing (*left to right*): Vithobha (staff), Jahangir B. Dubash, S. B. Shah, R. J. Joshi, Girish Munshi and Beewa (staff)

The tables of Bhabha, Palkhivala and Vimadalal were narrow with only one extra chair where the instructing solicitor could sit, with the client standing! When there were more clients, as was often the case with Nani Palkhivala, who at a very early stage of his career had acquired a considerable practice, conferences were held in the verandah outside – standing! Yes; client, solicitor and counsel all conferred – standing. At times, Palkhivala would even hold his consultations in his 1948 Hillman Minx – parked outside the chamber!

We young apprentices (there were several) had no table at all, not even a chair. I had literally half a chair, sharing it with another apprentice (Salé Marker), which was one of the three chairs opposite Kolah's table. Whenever any one of us had the good fortune to have some solicitor drop in to seek our advice or hand us a brief to argue in court, we would take him up to the Bar Library for a conference. Peace and quiet was not for those in Kanga's chamber. The hustle and bustle there trained me to think and work under the most uncomfortable conditions! Since then I have had no difficulty concentrating on the case in hand, despite frequent interruptions. Distractions in the form of children (at first) and (later) grandchildren invading the study have never bothered me. If one could concentrate on one's work in Kanga's chamber (in the high court building), one could

concentrate anywhere! We later shifted from these chambers in the year 1959 to a larger, more commodious chamber in a building adjoining the high court.

Despite all the physical inconveniences, the days I spent in the chambers on the ground floor of the high court building were the happiest years of my early professional life. We had the most amazing leader in Sir Jamshedji Kanga – all 6 feet 4 inches of him– but much taller in heart and mind. At 6:45 in the evening on almost every working day, when the conferences of the busy seniors were over, we would all gather around Sir Jamshedji's table and he would regale us with stories of old. We loved him because he was so exuberant – always childlike, never childish. Kanga's chamber was a busy chamber. It was also a very happy chamber where there was much fun and laughter.

One of Kanga's juniors – early on (before my time) when Kanga was the advocate general of Bombay (1922–1935) – was Harilal Kania, later Sir Harilal Kania. He became independent India's first chief justice. In the late 1980s, Kanga still remembered him. When we used to ask him about Kania, Kanga always said (quite disarmingly), 'He was a very nice and industrious boy, he read all my briefs.' Looking at the impressive portrait of Sir Harilal Kania that hangs in Court Room No. 1 (in the Supreme Court of India), no one but an affectionate, old senior would have described India's first chief justice as a 'nice and industrious boy'!

Naming lawyers – great and famous, and yet so different – remind me that when you mention a famous race horse, they always ask you, 'From which stable?' The stable is important. It establishes the ancestry and the breed. When you name a lawyer who has done well, people ask: 'From which chamber?' The chamber is important. It establishes the hierarchy and cultural tradition in which the lawyer has been reared. We who started our careers in Kanga's chamber were and are always proud to have belonged to it. Its leader was its most humble member. When both seniors and juniors in the chamber would be in court during the day, Sir Jamshedji would sit reminiscing to himself or reciting the Shahnameh of Ferdowsi (one hundred thousand lines), which he knew by rote![4] When someone would come along to deliver a letter for one of us juniors, Sir Jamshedji would receive it, sign a receipt for it in the signature book, and then remember to tell us in the evening that there was a letter which had been delivered during the day! What a great man – but how truly humble!

When Kanga completed 60 years at the Bar, Chief Justice Mahommedali Currim Chagla (of the Bombay High Court) – one of the country's great judges (the finest judge before whom I have ever practised) – unveiled Kanga's portrait in the Bar Library. In his speech on that occasion he fittingly described Sir Jamshedji as 'the uncut diamond of the Bar'. I recall an occasion in the early 1950s when Kanga still made an appearance or two in the Bombay High Court. He was sitting in the chief justice's court which was then hearing tax references.

Chief Justice M. C. Chagla and Justice S. R. Tendolkar invariably sat together on a bench during tax references. Kanga was waiting for his case to be called out. In the preceding matter, where some other counsel appeared, the court was left in some doubt as to the true construction of a particular provision of income tax law. Seeing Kanga in court, Chagla turned to his brother judge (Tendolkar) and said, 'Let's ask Kanga.' They put the complex point to Sir Jamshedji, who got up and immediately resolved the controversy in his inimitable style – his long arms gesticulating – unconcerned as to whether his answer would benefit the assessee or the commissioner of income tax.

Kanga's reminiscences of 'the old days' were simply delightful and full of word pictures – hence better remembered. Thus, as to how, when he was advocate general of Bombay, he once hosted a dinner at the Willingdon Sports Club for Justice Sir Murray Coutts-Trotter, chief justice of the Madras High Court (Madras is now known as Chennai) from 1924 to 1929. In those days, Scotch whisky came in bottles with cork-tops and the premium brand Johnny Walker Black Label cost just Rs. 8 a bottle! When the first bottle was opened and its contents poured in glasses amongst the guests, the chief justice of Madras (a connoisseur of good liquor) took his first sip and rejected the offering saying 'Cork'. Glasses were quickly removed and fresh glasses were brought; another bottle was opened, and its contents were poured. Again the chief justice took a sip and again he denounced the brew – 'Cork'. So the process had to be repeated. A third bottle went round the table, with the same result. Ultimately it was only the contents of the fourth bottle that was to the satisfaction of the chief justice! Jamshedji Kanga used to wistfully tell us that Coutts-Trotter downed several pegs of whiskey that evening and that the dinner he gave in his honour was 'very costly'!

Incidentally, there is a story (told by Kanga) about the founding of the Willingdon Sports Club in Bombay. When Lord Willingdon was governor of Bombay (1913–1918), he had invited an Indian member of the Viceroy's Executive Council (Sir Mahadeva Bhaskar Chaubal) – who was visiting the city – to a lunch at the Byculla Club (a club meant exclusively for the sahibs – the Europeans). The lunch was arranged, but when the chief guest arrived at the Byculla Club he was refused admission. 'No Indians please,' they said to him at the door. Lord Willingdon was furious, but the club's regulations overruled the governor's guest-list. Willingdon then decided that he would 'establish such a club where there are no distinctions and a man of sufficient social position can be admitted'. Lord Willingdon had friends amongst the Indian princes and Indian society, which (at that time) in Bombay meant also Parsi society. These individuals had personally approached the governor with a proposal for such an institution, and by the start of what was then called 'The Great War' (1914–1918), the time was ripe for the Willingdon Sports Club, which was ultimately established in the year 1917; the Hon'ble Sir M. B. Chaubal being one of its founder members!

Another one of Kanga's favourite stories was the one he got (second hand) from Lord Dunedin[5] when they were both travelling by boat from England to Aden (Kanga was returning to Bombay from the United Kingdom, where he would spend his summer vacation). Dunedin was a senior law lord in England from 1913 right upto year 1932. He told Kanga that when he dozed off (which was quite often) listening to the boring speeches of counsel, the complaint of his colleagues who sat with him was, 'Not only does our good Lord Dunedin fall asleep, but when sleeping he snores – and so disturbs the sleep of the other Law Lords!' About boring speeches of counsel, David Pannick QC, in a delightful collection of his articles (*I Have to Move My Car*, published in 2008 by Hart Publishing) says, 'What is surprising is not that Judges occasionally fall asleep during hearings but that they normally manage to stay awake!'

A lithograph by Honoré Daumier from his series, *Lawyers and Justice*, 1845

I had the enviable and cherished distinction of actually appearing in court with JBK. It was in the late 1960s, and it was Kanga's last appearance in court. But it was I who conducted the case, Kanga sitting next to me! It was in the court of Justice Vithal Mahadeo Tarkunde and it happened in this way: one of the parties was a client of Sir Jamshedji for nearly 40 years, and despite JBK telling him that he no longer appeared in court, the client insisted that he (Kanga) should appear in the case. He said it would bring him luck! I was chosen to argue the case. Now in our courts, cases don't run like trains on some sort of railway timetable. Case Number 5 in the list today may not reach for weeks. Well, this case – after we prepared ourselves in conferences – did not reach for several weeks, and in the building adjacent to the high court (about which, more anon) K. H. Bhabha had partitioned his part of the chamber (for it to be air-conditioned). Thanks to Bhabha this is where I sat, whereas Sir Jamshedji (who did not like air conditioning) had his large table on the other side of the wooden partition. Every evening, Sir Jamshedji would solicitously open the door of the air-conditioned chamber and say, 'Nariman, I hope you are there in court tomorrow, because you know I cannot read.' He was terrified that I might hop off to some other court and he would be left holding the brief. Of course, I continued to assure him that I would be there. Ultimately the matter did reach and, with the luck of Sir Jamshedji, we won. It was a suit for specific performance of a contract for purchase of land. After I read the correspondence and argued for the plaintiff (there was no oral evidence), there was a reply from the other side, and Jamshedji (bless his soul) like a jubilant school boy whispered to me, '*Ketli maja avech'* ('what fun this all

is'). He remembered his own days in court! I regard this appearance as a stellar performance of mine, especially since Jamshedji appeared with me (not I with him)!

I must confess that next only to my father, I have the highest reverence and affection for Sir Jamshedji Kanga.

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About how we came into the chambers of a building adjacent to the high court – the PWD (Public Works Department) building – is another story. Sometime in 1957 with the fast expanding litigation and the requirement for more courtrooms, the occupants of all the chambers on the ground floor (we were all licensees of the chief justice) were asked to leave. With some persuasion, Sir Jamshedji was asked to lead a delegation to Chief Justice Chagla, requesting that at least we should be given some alternative accommodation. I recollect that all the seniors in the various chambers joined this delegation with Sir Jamshedji leading it. Chagla received them courteously but gave them no hope; they would have to leave and find some other accommodation. 'In that case My Lord,' Jamshedji said in his booming voice, 'I will have to sit at home.' Chagla's brow furrowed. 'Why should you sit at home, Sir Jamshedji?' he queried solicitously. 'Well, either I sit in the high court building or I retire,' the old man replied a bit petulantly. The meeting ended. But the thought that Jamshedji should sit at home kept rankling with Chief Justice Chagla. There was some intensely personal, though invisible, bond between Chagla and Sir Jamshedji about which we became aware only later. Years before, when Chagla was a struggling and slightly impecunious young junior at the Bar and Sir Jamshedji was advocate general, Chagla's father was involved in litigation, and there was need for him to have some counsel. Young Chagla approached his own senior, Muhammad Ali Jinnah, then in top practice (Chagla was reading in Jinnah's chambers). Jinnah looked at the brief and then said, 'You know I never appear free of charge.' Though fees were modest in those days, Chagla just couldn't afford briefing Jinnah. Crestfallen, Chagla then approached the advocate general whom he did not know. Gracious and generous as always, Kanga took the brief, appeared gratis for this young man's father and the case ended. I believe Chagla

never forgot this good deed. Although we had to ultimately leave our chamber on the ground floor of the high court building – as did all other senior counsel occupying different chambers in the same high court building – Chief Justice Chagla, during his chief justiceship, had persuaded the PWD to construct an additional floor on the building just next to the high court with a connecting link, and there Kanga (and his brood) were to be accommodated in the largest single chamber on that floor – Chamber No. 1. There were other chambers (smaller ones) for the rest of the seniors who had to leave the ground floor of the high court. None of this would have happened but for Chagla's concern that Jamshedji should remain, as long as he lived in, or as near as possible to, the high court.

I must mention here a lawyer who was not in our chamber – J. M. Thakore (Shankar Thakore). He was in the chambers of Motilal Setalvad, and was his nephew. At the very birth of the state of Gujarat – on 1 May 1960 – he was appointed as the state's advocate general, and he filled that office with great distinction. Under a succession of chief ministers belonging to various political parties, he had been the state's advocate general through 27 different administrations including several interim periods of President's rule – a unique tribute to his superb competence and unshakeable integrity. However, I want to mention a personal anecdote about him; it is particularly touching, and reveals the man. I have been always impressed by what he once told me – long years ago – that he firmly believed that a successful lawyer should not disturb the even order of things. For instance, you don't dispense with members of your staff however old and inefficient they have become. If you have made progress in life, it is because of the good fortune not of yourself alone, but of persons around you as well, including those who are dependent on you. I have never forgotten this home-spun advice. And it has a sequel. When some years later I related this story to my dear friend at the Bar, Reggie Mathalone, he told me something significant. 'These are the characteristics of great lawyers,' he said. Mathalone's own senior, Sir Dinshaw Mulla, had an old, cheeky peon who hardly did any work. He was a lazy fellow, but Jerbai Mulla (Lady Mulla) believed he was a lucky man. Mathalone recalled how once, after an altercation in the morning, Sir Dinshaw had dismissed Dhondoo (that was his name). In the evening, Mathalone was leaving Mulla's chambers and he found the complacent Dhondoo still outside the door happily chewing his paan. He asked him why he had not left. Dhondoo

wasn't perturbed. He said quite confidently that he would meet with 'memsahib' in the evening, and all would be well. His confidence was not misplaced. Next morning, Dhondoo was back at his job – doing nothing again! Great lawyers instinctively know that luck or Providence – or call it what you will – plays such a major role in their lives and in their success, that they never push it too hard!

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I have strayed. Reminiscing about JBK, Shankar Thakore and Dinshaw Mulla, I have gone fast-forward. Let me step back in my narrative. In the year 1949, I had passed my final LLB examination with distinction in the first class, standing second in the university. I also stood first in my advocate's examination next year; it was then conducted by the Bar Council of India. It was in the Government Law College, Bombay, that I got my first gold medal – the Kinlock Forbes Gold Medal – for excelling in Roman law and jurisprudence. It is still my prettiest gold medal – solid 24 carat with a replica of the Bombay University Building (constructed in Gothic style) beautifully embossed on it. With all these distinctions when I was enrolled as an advocate in November 1950, I thought I knew a good deal. But I was wrong.

I learnt quite early that when you join the Bar you must enter the law, as you do in the sanctum sanctorum of the magnificent Taj Mahal at Agra, with your head bowed because you know so little! And even when you grow up, even when you are at the top of the profession, you are always learning. In the very first month of my practice as a junior of R. J. Kolah, I was simply amazed at my colossal ignorance. When I was asked by my senior one evening to go and find out the position in court of one of his matters for the next day – on the *kutcha* (or rough) board put up in the high court premises the previous evening, as the board was printed the next morning – I was crestfallen; I came back and told my senior that I could not find it! This was not because it wasn't there – it was – but because I could not find it! As Sherlock Holmes would have said, 'You see my dear Watson, but you do not observe.'[6]

In my very early days at the Bar, I and others like me would sit around in courts to follow what was going on. But it is very difficult at the beginning

of one's legal career to follow anything at all in court. There is a lot of legal mumbo-jumbo unfamiliar to the lay person – even to a young lawyer. So, some of us, when we had no work elsewhere (which was often), used to sit in the matrimonial court where no great depth of legal knowledge is required to follow the proceedings. It was easy to comprehend what was going on and it was spicy and interesting as well. I remember on one occasion, a Parsi husband was suing his Parsi wife for 'restitution of conjugal rights'.[7] That is, he wanted his wife back by a court decree, though she was reluctant to oblige, apparently for good reason, as will appear. The wife in this case had cross-petitioned and asked the court for a divorce on the ground of (the husband's) cruelty. Now, under Parsi matrimonial law,[8] the proceedings (whether for divorce or judicial separation or restitution of conjugal rights) are required to be tried before a judge along with a group of 'delegates' who function like a jury, and whose verdict on all questions of fact (but not of law) are binding on the judge. In the case I witnessed, the judge (Justice N. H. Coyajee), after the oral evidence concluded, summed up very strongly in favour of the wife, and instructed the delegates that she should be given a divorce. The delegates spurned his summing up. They were more impressed with the eloquence of the advocate for the husband – who, incidentally, was a lady!

And they brought in their verdict which was that the woman should not get her divorce. The husband, they said, was entitled to his decree for restitution of conjugal rights and the woman was sent back into the arms of a person she regarded as a beast. There was loud crying and wailing in court. I vividly remember the incident. The judge grew red in the face and fumed (silently, of course) while the woman howled and pleaded. Nothing could be done. The final judges of fact (the delegates) had spoken. The course of justice could not be altered. The delegates – chosen because they represented 'the right-minded members of the Parsi community' – thought they had dispensed justice. And very pleased with themselves they were. Very pleased too was the husband who with the help of his mother, physically dragged the helpless woman out of court and took her to the matrimonial home. The very next session, which was about three or four months later, the same woman came back with her nose bandaged and with a second petition for divorce on the ground (this time) of actual physical cruelty. It appears that the husband had been so pleased with his success on the prior occasion that having taken his reluctant wife back home, he

celebrated the event by strapping her to a chair, and with the aid of his mother and a very large knife, literally cut off a small tip off her nose with whoops of joy. '*Nak Kapi nakhyu, moi – noo*' ('we cut off the nose of this horrible wench').

At the previous session, the woman had pleaded that her husband was a cruel man but the eminent members of our community (in the Parsi matrimonial court) said, 'No' – they thought there was 'just ground' (that's what the law says) that she should go back to him. The judge who tried the matter was the same judge as in the previous session. He was almost gleeful when he heard the sordid story. Ignoring the bandaged nose of the poor woman – the plaintiff – he turned to the delegates and said (not in words but in looks), 'See – I told you so.' Of course, the lady got her divorce this time.

Here we had two sets of 'right-minded' people – jury and judge – arriving at contradictory conclusions, and both acting in the name of justice. Ever since this incident, I confess that I am never too surprised at frequent protestations against 'injustice' – whether in the high courts or in the Supreme Court. Justice is so often a matter of perception on which opinions can genuinely differ. The American writer and critic Henry Louis Mencken is attributed with the quote, 'Injustice is relatively easy to bear; what stings is justice.'[9]

As to why injustice is tolerated, there is a charming story told by Lord Pethick-Lawrence – secretary of state for India (1945 to 1947) – in a letter addressed to his friend, Mohandas Gandhi. (The letter dated June 1946 is reproduced in the 'Documents on Transfer of Power, 1942 to 1947'.)[10] In the letter, Pethick-Lawrence tells Gandhi:

> Did I ever tell you the following story illustrating the profound human belief in the rightness of things lying behind injustice? A Parson said to a farmer who was worried about something 'Put your trust in Providence, my man'. 'No', said the farmer 'I have no trust in Providence. He lost me my pig two years ago. He let my home be burnt last year. He took away my wife last summer. No, I refuse to trust in Providence. But I will tell you what. There is a power above Him who will pull him up if he goes too far!'

* * *

Over the past 59 years at the Bar, I have come to realize that justice is elusive, sometimes unpredictable, and often unsatisfying. I recall the case of a Parsi doctor, Bakhtyar Rustomji Hakim, who migrated to the United Kingdom and achieved notoriety as the principal actor in one of England's most infamous murder cases in the 1930s; so infamous that his wax figure was exhibited for many years in the Chamber of Horrors at Madame Tussauds in London. And here is why. Dr Bakhtyar Hakim was a small-time surgeon in Bombay in the early 1930s. He had married a lady from the Ghadially family ('Ghadially' means 'watch maker'); she was a cousin of my maternal grandmother. They were well known because the lady's father had exhibited much prowess in repairing the enormous clock on Rajabhai Tower, where the University of Bombay is located. Well, soon after his marriage, Bakhtyar Hakim suddenly left his wife and was not heard of again till at a much-publicized trial, many years later; it was revealed that Bakhtyar Hakim had gone off to England, set up practice as a doctor in Lancaster, changing his name by deed poll to Buck Ruxton. He was well respected and popular with his patients, and was known to waive his fees when he felt patients could not afford to pay. In England he lived with his 'common-law' wife,[11] Isabella Kerr, and their three children. Isabella was an outgoing lady who enjoyed socializing with Lancaster's elite, and was a popular guest at functions. Dr Ruxton was emotionally unstable and obsessively jealous. He became convinced that she was having an affair behind his back, though there was no evidence of infidelity. Eventually his jealousy overwhelmed him and in September 1935 he strangled Isabella with his bare hands. In order to prevent their housemaid from discovering his crime before he could dispose of the body, he suffocated her too. Ruxton then proceeded to dismember and mutilate each of the bodies to hide their feminine identities so as to avoid detection. The English law at the time was that if the body of the victim was not traced or identified, the jury could not convict the accused for murder but only for manslaughter. Various feminine body parts were found wrapped in old newspapers strewn all over England as far as Edinburgh, but one such newspaper contained a slip-sheet which was only sold in a particular area in Lancaster, and that is how the doctor was traced. The bodies were identified using the then fledgeling techniques

of fingerprint identification, forensic anthropology (superimposing a photograph over the X-ray of a victim's skull) and forensic entomology (to identify the age of maggots and thus arrive at the approximate date of death). This was one of the first cases where such forensic evidence was successfully used to convict a criminal in the United Kingdom. That is why the trial of Buck Ruxton is recorded in the *Notable British Trials* series. Ruxton's trial lasted for 11 days. He was defended by Sir Norman Birkett KC (leading lawyer of the time), but the jury returned a verdict of 'guilty' and the judge sentenced him to death. A petition urging clemency for him had 6,000 signatures but the home secretary turned down the plea and he was hanged in May 1936. Most people believe that Buck Ruxton was rightly convicted. But 15 years ago a broadcaster (Terence Whitaker) wrote an open letter in *The Times of India*, Bombay, announcing that he proposed to write an account of the trial of Buck Ruxton (which he believed was grossly unfair) and wanted to know whether anyone in India knew anything about him or his first wife whom he had left in Bombay. I responded and told him what I knew. He wrote back to me saying that the police had ganged up with the prosecutor and got an innocent man convicted, and that he was shortly going to write a book about it. I never heard from him again. In his letter, Whitaker said that people in Lancaster still told stories of the doctor's care and concern for the residents and his great bedside manners. Well there you are – again different perceptions of 'justice'. When I went to visit Madam Tussauds 20 years ago, I found Ruxton's wax model in the Chamber of Horrors. But when I visited the place a few years later, I found that his wax model had been removed – making way for new horrors! It may be the macabre in me but, quite frankly, I do miss having to tell friend and foe alike that there is a distant relative of mine in the Chambers of Horrors!

* * *

I now return to another of my early experiences in the Bombay High Court when I was witness to an incident early in my career which left a deep impression on me. It was a defamation case in which a Parsi solicitor and a Parsi journalist were involved. I was at the Bar for only three years when the defamation suit was heard. The facts were that in the 1950s a Parsi

journalist (of no great repute) – Homi Daji – would lampoon and slander all and sundry in his columns in the weekly Gujarati newspaper, *Kaiser-i-Hind*.[12] All the lampoons and slanders are long forgotten, but not the one which concerned Fardunji Dotivala, a Bombay solicitor (partner in a very old and distinguished firm of solicitors). Homi Daji wrote a column maligning Fardunji Dotivala (who always wore his *feta* – Parsi hat – at the back of his head, and we youngsters often wondered when it would fall off!). One day, Fardunji rushed into our chamber with a scurrilous article of Homi Daji and angrily showed it to Murzban Mistree (who, next to Sir Jamshedji, was the seniormost member of our chamber). Murzban read it and went blue in the face. Homi Daji had said in this article that Fardunji (who was a bachelor) used to sleep with his maidservant in his flat. The woman was also named. 'Shocking, shocking,' said Murzban. 'You must immediately file a suit for defamation.' So some of the more-experienced juniors in the chamber quickly prepared, for Fardunji, a plaint (a document that initiates a suit), and the suit was filed in court in record time. When an action for such a scurrilous libel is filed, there is generally an offer of a printed apology by the defendant and payment of the plaintiff's 'costs-thrown-away', and everyone goes home happy. But there was no prospect of such an offer from Homi Daji. He was, what one would call, a 'nut'; and a colour – fiend as well. If he wore a green suit, he would wear a matching green shirt, green socks, green tie, and even green shoes, and on the jacket of his coat he had his name sewn on (!). Such a person could never be expected to apologize. And regrettably for Fardunji, the suit had to go on because Homi Daji pleaded justification and public interest (should a solicitor – a prominent solicitor having the confidences of his clients – he said, have sexual relations with his maidservant?). This was the subject of an article published in the next issue of the *Kaiser-i-Hind* weekly after the suit was filed! The battle lines were drawn and the case had to go on before a judge (Justice N. A. Mody) who had been recently elevated from the Bar, and who knew that Homi Daji was a peculiar fellow. He also knew that the plaintiff – solicitor – was a respectable person. The judge implored and then pleaded with Homi Daji to settle, but Homi Daji said he wanted 'justice', and the case dragged on for a full month. It was a crowded court every single day of the hearing, and those who had never read the article, came to hear that a well-known Parsi solicitor had illicit relations with his maidservant. In the witness box, Homi Daji improved on his story and said

that Fardunji Dotivala had illicit relations with yet another maidservant whom he then proceeded to name. And the whole unedifying spectacle dragged on and on for the jollification of unemployed or hardly employed bystanders until it ended in sheer exasperation after four full weeks of hearing. The suit was finally withdrawn with a makeshift half-hearted apology, which was not even published. The case has been an object lesson for me viz. defamation actions in India are a luxury and a dangerous luxury at that, that they are too often filed in a hurry, and repented only at leisure. And then it is too late. I dissuade clients from filing such actions – civil or criminal – with Fardunji Dotivala's case in mind.

* * *

When I joined the Bar in November 1950, V. M. Tarkunde was in the front rank of advocates practising on the appellate side. Years later, when he became a judge, he sat for some years on the original side (OS),[13] and presided over the trials in civil cases. When he laid down office on retirement, he had words of genuine praise for the 'dual system' then prevailing on the original side. The dual system was a system prevalent on the original side of the high court where a client had to engage a solicitor in the case, and the solicitor had no right of audience himself but had to brief an advocate or counsel. The dual system flourished on the original side of the high court but it has been abolished since the year 1977, though attorneys (or solicitors) continue, to this day, to brief counsel in important cases filed in the high court in its original civil jurisdiction. Entry into the original side was difficult and arduous. For a practising lawyer, there was the nerve-racking examination to qualify as an advocate (OS) and for a solicitor there was a gruelling attorneys' examination.[14] Its prescribed syllabus was most forbidding.

At the Bar, a young lawyer learns much – simply by osmosis. Scientifically, osmosis is the diffusion of a liquid through a porous barrier. But learning the law by osmosis is simply being with other lawyers (senior to you) and imbibing what they say and do!

During my early days at the Bar, I came to know and learnt a great deal from the professional giants by just listening to them and watching them perform. There was of course Sir Jamshedji Kanga (in whose chamber I

was privileged to sit and read). Jamshedji's conferences hardly ever took more than half an hour. He had a brilliant and incisive mind, and he would get to the point at once. By contrast, there was Sir Noshirwan Engineer, British India's last advocate general.[15] His chamber was next to ours in the high court building. I had the privilege of attending conferences with him. They would last long and sometimes stretch into lunch-time when Sir Noshirwan would refresh himself with a glass (or two) of sherry (leaving us parched, our mouths watering!). He was erudite and thorough, but laborious.

Then there was C. K. Daphtary (CK), who (when I joined the Bar) was advocate general of Bombay. He went on to become solicitor general of India and later attorney general of India (1963–1968).[16] Also, there was Karl Kandalavala (on the criminal side) and M. P. Laud (on the civil side) who were trial lawyers – two of the most able cross-examiners of their time. Among the solicitors who regularly attended court to instruct counsel, there was Nusserwanji Sethna (of Romer Dadachanji Sethna & Co.), Tricumdas Dwarkadas (of Kanga & Co.), Shiavax Khambatta (of Mulla & Mulla), Cecil Caroe (of Craigie Blunt & Caroe; he was always 'old Caroe' to those who knew him), K. M. Diwanji (of M/s Ambubhai & Diwanji) and K. K. Lala (of Payne & Co.); Lala and Diwanji constantly briefed me early on in my career.

I recall the greatness and humility of Sir Jamshedji, the urbane courtesy of Sir Noshirwan (except when he would not share his liquid refreshment with us!), the hard-working and painstaking ability of M. P. Laud, and above all, the forensic skill and irrepressible sense of humour of C. K. Daphtary. Chandubhai was not averse to a bit of leg-pulling – though he never meant to be, nor ever was unkind. I recall an instance when (in the year 1968) – this was in Delhi – an attempt was made in court on the life of then chief justice of India (Justice M. Hidayatullah) by a disgruntled litigant. Justice Hidayatullah grappled bravely with the assailant in Court No. 1, and with the help of the assistant registrar and one of the Supreme Court advocates overpowered him, but not before the assailant had injured one of the other justices sitting on the bench along with the chief justice of India. That judge suffered a knife wound on his head. Daphtary visited the judge later in hospital and after inquiring about his condition, and finding that he was on the mend, said to him nonchalantly (puffing away on his pipe), 'They are most dastardly, these assassins. They always attack you in

your weakest spot!' The judge was taken aback, but then seeing the mischievous twinkle in CK's eye, laughed heartily!

Chandubhai was mischievous even in Court. When he resigned his office as attorney general (1963–1968) and came back to private practice, I opposed him as counsel in a celebrated case: *Firestone Tyre and Rubber Co. vs Synthetics and Chemicals Ltd.* (1971). There were a number of fine points of company law involved. I argued the case on behalf of Firestone before Justice D. P. Madon when he was still in the Bombay High Court (he became chief justice of Bombay in August 1982 and was later appointed a judge of the Supreme Court in March 1983). When Daphtary rose to reply to my arguments, he spluttered, 'My learned friend …'; he then cleared his throat and said, 'My learned friend …'; he coughed a little and again cleared his throat. The judge, very solicitously, said, 'Mr Daphtary why don't you sit down and take a sip of water?' CK, who was waiting for this opening, said, 'No, no My Lord it has nothing to do with my throat. It is the arguments of my learned friend – I just cannot swallow them!'

I remember tales of old narrated (over lunch at the Ripon Club) by Nusserwanji Sethna, senior partner of the attorney's firm of Messrs Romer Dadachanji and Sethna,[17] the excellent 'written instructions for brief' of Shiavax Khambatta (senior partner in the attorney's firm of Messrs Mulla & Mulla), the dogged tenacity (in and out of court) of Sorab Vakil (senior partner in Messrs Payne & Co.), and the fighting spirit exhibited by Rustom A. Gagrat (of Messrs Gagrat & Co.) who invariably attended court hearings in all cases handled by him. In court, Rustam Gagrat would sit on the bench opposite arguing counsel (with his back to the judge – the place allocated for the instructing solicitor). On one occasion when his counsel Maneck Jhaveri – a senior lawyer – was arguing and taking a lot of flak from the presiding judge (Justice S. R. Tendolkar), Gagrat kept bobbing up (his back to the judge), angrily instructing his counsel to tell the judge this-and-that, but old Maneck Jhaveri was a calm, astute lawyer. Leaning over, he told his solicitor in a pleading whisper, '*Oo soo karoo Rustam; Oo bolas tó eh ang per aowse*' ('what can I do Rustam, if I say anything the judge will jump on me'). S. R. Tendolkar was brilliant but, temperamentally, a bit of a bully! All this and more I remember well.

A few more memories also come to mind. In my early years in Kanga's chamber – 1951 to 1953; before I found my 'legs' in court – D. T. Laurie (senior partner of a century-old firm of attorneys, Messrs Crawford Bayley

& Co.) frequently used to send 'instructions for drafting written statement of defence', on behalf of the Bombay Municipal Corporation, to Sir Jamshedji Kanga. Kanga was the Bombay Municipality's retained counsel for more than 40 years. Jamshedji – whose eyesight was failing – would pass on the brief to me, and I would produce a draft, after which Laurie would come over to the chamber for a conference with JBK. Naturally, there would be suggestions and corrections (and another draft, and sometimes still another) – but on every occasion – Sir Jamshedji never forgot to remind the solicitor that 'it is Nariman who has done all the work' (which to a junior like me – at the time – was more than all the fees in the world!). I have always noted that greatness and humility invariably go together – a truly great person of the law is also the most humble. 'I am still learning,' JBK would say at 92 – his bright eyes glistening!

Incidentally, Jamshedji's fees for 'drafting the written statement' were invariably 8 gold *mohurs*[18] (Rs. 120), plus 2 gold *mohurs* (Rs. 30) for the conference! In the 1940s and 1950s, a brief from a solicitor *always* came marked with a fee. If it was insufficient, the counsel (who was confident of himself) could and did return it. I remember Nusserwanji Sethna telling me about F. J. Coltman,[19] an English barrister (before my time) who was in flourishing practice in the Bombay High Court. Sethna once sent a brief to Coltman for a long-cause suit (i.e., a witness action). Sethna's clerk took it from the office of the solicitor to the counsel in his chambers (in the high court). Coltman looked at the size of the brief and the fee marked on it, and said, 'Fees insufficient,' and handed it back. The clerk returned with the brief to the office (of Merwanji Kolah & Co., and later, Romer Dadachanji Sethna & Co.) – a good twenty-minute walk. Sethna then marked a slightly higher fee (raising it by 4 gold *mohurs* or Rs. 60). Again, the clerk trundled off to deliver the brief to Coltman, who took a look at the revised fee, and again said, 'Fees insufficient,' handing back the brief. The clerk 'legged' it back to the office. Sethna scored off the fee, leaving it unmarked, and told the clerk, 'Please inform Mr Coltman that he can mark any fee he wishes.' Back went the clerk with the brief and the message. Coltman, however, was an old stickler. He sent the clerk back saying he could not accept an unmarked brief! Sethna then wrote a much higher (almost excessive) fee, which the clerk took back (for the fourth time) – and then, only then was it accepted!

There was no such luck for juniors like me and for my very dear colleague, Jangoo Khambata, also in the chambers of JBK (Some years later Jangoo left and joined Glaxo, becoming in course of time its managing director in India. But Eva and Jangoo, over the years, have always remained the closest of our friends.). Jangoo and I were the 'favourite' junior counsel of Solicitor Burjorji Aibara (sole proprietor of Aibara & Co.). He would often brief one or the other of us in his cases in court. However, the fees he marked had to be seen to be believed! 'Out of misery, you will learn,' my grandmother used to say; and we did! Aibara's briefs invariably involved highly complicated questions and we would spend hours on the preparation of the case. As a reward, Burjorji would occasionally send each of us a *khatava-nee* brief (a complimentary brief) in the form of a 'Brief for Consent Decree', on which he would mark the magnificent fee of 1 gold *mohur* (Rs. 15)! The then customary fee for appearing for a consent decree was 2 gold *mohurs* (Rs. 30). Either he was unlucky or we were. The consent decree brief would not get worked out until we had made at least three appearances in court due to some defect in the consent terms, or something or the other about which the judge was not wholly satisfied. At least three adjournments for only 1 gold *mohur*! But as our (part-time) professor in the law college, Nani Palkhivala, used to tell us, 'God pays, but not every week!' Even God pays, we would grumble, but not Burjorji Aibara! Incidentally, we often pulled the old man's leg for his parsimonious marking, and I must say he took it well. He was a dear old soul and I fondly remember him.

Notes and References

1. This entire description of the high court building is taken verbatim (with permission) from a fascinating article called 'Three Faces of Justice' by an advocate and brilliant photographer, my friend, Barzo Taraporewala. It appears in the journal of the Incorporated Law Society of 1995 in celebration of its one-hundredth year. The Incorporated Law Society's members are all solicitors of Bombay.

2. Devilling: The well-established custom at the English Bar of handing over a brief and the responsibility for it to another counsel with the instructing solicitor's permission, or of obtaining assistance from another barrister in drafting and researching the relevant tract of law. See *The Oxford Companion to Law* (1980), David M. Walker, Clarendon Press, Oxford.

3. Sir Edward Marshall-Hall had a stentorian voice, and to keep it in good fettle he always carried around with him a throat-spray which he used ostentatiously when addressing a British jury!

4. The Shahnameh is an impressive monument of poetry and historiography, mainly being the poetical recast of what Ferdowsi, his contemporaries, and his predecessors regarded as the account of Iran's acient history. The Shahnameh has 62 stories, 990 chapters, and some 60,000 rhyming couplets, making it more than seven times the length of Homer's Iliad. There have been a number of English translations, almost all abridged; Mathew Arnold produced one of the first English translations of the story of Rostam and Sohrab.

5. Viscount Dunedin was a Scot and was appointed privy councillor in 1896. He was appointed lord of appeal in ordinary in the House of Lords in 1913, and retired in 1932.

6. From *Sherlock Holmes: The Complete Novels and Stories*, Volume I, Sir Arthur Conan Doyle, 'A Scandal in Bohemia', pp. 209–211, W. W. Norton and Company, London, 2005.

7. The only merit of a statutory provision in marriage laws that permit, a decree for restitution of conjugal rights to be passed is that a year's noncompliance gives the holder of the decree the right to sue for divorce. At the time of introducing this provision in the Hindu Marriage Act, and in the Special Marriage Act, there were heated debates in Parliament in favour and against such a provision being made in our law. Acharya J. B. Kriplani, a senior parliamentarian said that such a provision 'was physically undesirable, morally unwanted and aesthetically disgusting'

(Parliamentary Debates on the Special Marriage Bill, 10 December 1954).

8. The Parsi Marriage and Divorce Act, 1936; Section 46.

9. *The Times Book of Quotations* (2000), Harper Collins Publisher Glasgow; Philip Howard, p. 395.

10. *Constitutional Relations between Britain and India: The Transfer of Power, 1942–47*, Vol. VIII, p. 862 by Nicholas Mansergh; Her Majesty's Stationery Office, London, 1982.

11. A common-law wife was a de facto wife and a common-law marriage was a marriage by habit and repute.

12. The language we Parsis speak (and write in) is Gujarati – but it is not the refined language spoken in Gujarat, it is our own patois; Parsi Gujarati is to Gujarati what Hindustani is to Hindi!

13. Suits arising in the City of Bombay – and Greater Bombay – had to be filed on the original side of the high court, the court of original civil jurisdiction – to be distinguished from cases from the districts (or the mofussil) which had to be filed on the appellate side.

14. The attorneys' examination used to be conducted by the high court but since the 1980s it is being conducted departmentally by the Incorporated Law Society.

15. He was prosecutor for the British-Indian Government in the famed (or notorious) INA (Indian National Army) trials held in the Red Fort at Delhi between November 1945 and May 1946, when Gurubaksh Singh Dhillon, Prem Sahgal and Sah Nawaz (of the erstwhile IN under Subhas Chandra Bose) were charged with waging war against the king before an army court martial.

16. After Motilal Setalvad, India's first attorney general (for 13 years), resigned his office on 31 December 1962 due to

differences with the then law minister, A. K. Sen, the post remained vacant for some time – to be later filled by C. K. Daphtary from 1963. Motilal Setalvad recalls his differences with the law minister rather caustically in his memoirs (*My Life Law and Other Things* (1971), N. M. Tripathi Pvt. Ltd., Bombay, p. 494); he writes:

A cartoonist in Shankar's Weekly aptly depicted the episode in a cartoon which showed the Attorney-General-ship as a bunch of grapes on a tree which the Law Minister shown as a fox was trying to get hold of, but had failed to seize. The caption was: 'Law Minister Sen drops proposal to be Attorney-General. Grapes are sometimes sour.' A more acid comment was that of a friend who always thought unkindly of the politician. Said he: 'An attempted political dacoity has happily failed.'

17. A short walking distance from the high court.

18. Fees were always marked in gold *mohurs*, but never paid in gold *mohurs*; they were paid in rupees (fifteen rupees to one gold *mohur*).

19. Described by P. B. Vachha as the last of 'the British giants of the Bombay Bar' … Vachha writes that he proved a most forceful and tenacious advocate, always sticking to his guns in the face of all obstacles. He had a very telling and trenchant style of advocacy, and was in great demand in all important suits and appeals. Coltman left Bombay in 1947, being the last in the long and luminous line of English barristers, who gave their talents and made their fortunes in the High Court of Bombay. *Famous Judges, Lawyers and Cases of Bombay – A Judicial History of Bombay during the British Period* (1962), P. B. Vachha, N. M. Tripathi Pvt. Ltd., Bombay, pp. 151–152.

Chapter 3

JUDGES DURING AND BEFORE MY TIME

An admirable quality of his (Justice K. K. Desai) was that if he decided a case against a particular party after hearing the evidence, he would always recuse himself when another case of the same party was called on – no matter what that case was; an example which judges in the present day would do well to emulate.

*I*n my time, we were fortunate to have judges who were considerate and kind to juniors. Amongst them were Justice N. H. Coyajee, Justice Sunderlal T. Desai and Justice Kantilal T. Desai, not to forget Chief Justice M. C. Chagla, who was in a class by himself.[1]

I remember that on many occasions when we juniors would gather in Justice Coyaji's court, and a senior advocate[2] would be appearing solo in a bulky application ('motion', as it is called), Justice Coyaji would say to him with a smile on his face, 'What Mr [so-and-so], such a heavy case, and you are appearing alone?' Promptly, the solicitor instructing the senior would take the hint and one or the other of us youngsters standing in court – simply *looking* intelligent – would be instantly 'briefed' to appear with the senior, to enable us to earn a small fee! At the beginning of our professional career we did look forward to these 'crumbs' from the judge's table! Another judge, Justice Sunderlal T. Desai (who, after a long judicial career, practised for many years in the Supreme Court) would always slip into his judgment a word of praise for the arguing junior – a tremendous boost for the latter's morale. And when someone very senior in the profession (on the other side) once said of my argument that 'matters are not as simple as my young friend has made out', the prompt response of Justice Kantilal T. Desai (also supportive of younger members of the Bar) was, 'But that is the art of advocacy: to make simple what is complicated and not vice versa!'

Chief Justice M. C. Chagla was the brightest and the best of the judges in my time. He had a fine mix of all the qualities of an ideal judge. He was highly intellectual and very judicial. And his treatment of juniors was exemplary. When I was only a year old at the Bar, Nani Palkhivala had entrusted me with an appeal from a judgment in a writ petition under the Bombay Land Requisition Act, which had been dismissed by a single judge.

I was to look up the matter and prepare for him the law on the points involved in the appeal. Palkhivala had another engagement before the Income Tax Appellate Tribunal. As my luck would have it, the appeal reached hearing (in his absence) before a bench consisting of Chief Justice Chagla and Justice Gajendragadkar (later to become CJI) – at that time about the strongest division bench in the country. I shuffled into court and weakly mentioned that Palkhivala was appearing in the matter and would hopefully arrive in a short while, and could the case stand over. Chief Justice Chagla courteously said that they did not know what the matter was about, and that this was a great opportunity for me to begin. Of course, I knew it was not, since from what little I had read, it appeared to be a pretty hopeless appeal. I bravely went on, stated the facts, read the legal provisions, and did not have much more to say. I could see the solicitor and clients behind me, wringing their hands in despair! Fortunately, one of them had the good sense to go fetch Palkhivala post-haste, but by then I had already made a perfect mess of the appeal. Palkhivala arrived whilst judgment was being delivered (my argument having concluded in about half an hour and the other side not being called upon). Palkhivala interrupted the judgment to mention (more felicitously than I could) the interpretation of the relevant section, that our clients had been canvassing for. Chagla did not like interruptions when he was dictating judgments but permitted this one. He listened to Palkhivala, gave an answer to the interpretation, and then said, 'Mr Nariman very ably put forward the same point and we have rejected it.' I knew I had done nothing of the sort. Chagla then went on to add, 'I don't think, Mr Palkhivala, you can add anything more to what Mr Nariman has so well presented.' I knew how 'well' I had presented the point! But not a smile escaped Chagla's lips and he made it appear that he was dead-serious in the compliment he paid to a junior whose face he had never seen before, and whose name he had never heard before! The graciousness of the man was abounding. I have not seen such a combination of knowledge and graciousness, not until I met, and came to know and respect (in later years), Justice M. N. Venkatachaliah – chief justice of India – another great judge and a great human being.

I recall being informed by seniors that some judges of yesteryear (before my time) were not so kind or considerate to youngsters at the Bar, for instance, Justice Badruddin Tyabji. When Jamasji Dastur (of Dastur and Co. Solicitors), who was Sir Jamshedji's brother-in-law (Jamasji had married

Jamshedji's sister), would come to our chamber at about 7:15 p.m. in the evenings to take a lift back home with Sir Jamshedji, the latter would occasionally pull his leg and tell him, 'Jamasji, *tame a-poone ghana heran Kartata.*' ('Jamasji, you used to harass us a lot.') It appears that in his very early years at the Bar, Dastur would brief his younger brother-in-law. One day he gave a brief to JBK to obtain a dismissal of a suit settled out of court. The matter was in the court of Justice Badruddin Tyabji. Jamshedji mentioned his appearance when the matter was called out and prayed for a dismissal of the suit. But Jamasji Dastur, who was in court 'instructing counsel', interjected, 'Tell the Judge to dismiss it under Rule 202.' JBK (then a raw junior) dutifully did so, only to hear the judge roar, 'Who are *you* to tell me under which rule I should dismiss the suit!'

Justice Tyabji not only roared at the Bar – he was brusque even to his own chief justice which reminds me of another of Kanga's anecdotes. Badruddin Tyabji decided cases fairly and honourably[3] but his own two sons were members of the Bar and in every case that came before Justice Tyabji, solicitors in Bombay would make sure to brief one of the sons on behalf of their client. If one of them briefed son A for the plaintiff, the opposing solicitor would promptly brief son B for the defendant! The Tyabjis (father and sons) lived and dined together, and malicious gossip had it that they discussed their cases at the dining table! When this was brought to the ears of Chief Justice Sir Lawrence Jenkins, he sent word to Justice Badruddin Tyabji politely inquiring whether it was not inappropriate for sons to appear in their father's court. Stung by the innuendo of doing something wrong, Tyabji reportedly thundered, 'Go and tell the Chief Justice to mind his own business!' The matter rested there. The chief justice apparently minded his own business, and Justice Tyabji kept on deciding cases before him – favouring neither of the two sides.

Sir Lawrence Jenkins had come to Bombay as chief justice in 1899, and affected many changes. He greatly encouraged the Indian Bar, and it was during his regime that Indian practitioners on the original side obtained a firm footing there. Kanga told us that Jenkins was loved by the Indian Bar. He did a great deal to improve 'the general atmosphere' by his liberal and sympathetic administration of justice, unlike some of his colleagues. Kanga used to tell us that there was an English judge at the time – Justice Russell; whenever he came into court in the mornings and did not see any English

barrister present, he would loudly ask, ‘Where are all the Sahibs today?’ Quite disconcerting for Indian advocates!

* * *

When I joined the profession, administrative law was in its infancy and the scope of Article 226 (conferring power on high courts to issue high prerogative writs under the Constitution) had not yet been expanded by judicial interpretation. Litigation was almost entirely confined to suits and interlocutory applications, which was just as well for the likes of me, because it is not in writs that you got your training in the law, but in contested suits (i.e., civil actions).

The training that we received while conducting original civil trials, or assisting in the conduct of such trials, was invaluable. I conducted civil cases on my own in my fifth year at the Bar. There were many pitfalls and we had to be precise in our pleadings. All relevant facts had to be presented and relevant legal submissions had to be made. The statements in written pleadings had to disclose ‘a cause of action’, i.e., the facts that were pleaded had to make out a case in law (so knowledge of the law on the subject in hand was critical). When the suit became ready for trial, a decision had to be taken by counsel as to the number of witnesses that were to be examined and what they would say, and which documents would have to be ‘proved’.[4] What was pleaded could only be proved by means of ‘proof’ acceptable in a court of law, i.e., according to the laws of evidence. The ordeal of examination of witnesses and their cross-examination was both exciting and exhausting. We had to think on our feet to ask the right questions, and make sure they were not too many. And the trial went on inexorably from one day to the next. In the evening, we had to read the notes of evidence as recorded by the judge, and suggest corrections, if any, the very next day. And in the evening we also had to prepare for further examination and cross-examination for the following day. In cases where the documents disclosed were many, and there was much oral evidence, the night was almost sleepless with the following thoughts recurring, ‘If only I had not asked the witness that stupid question! If only I had thought of what to ask him when he gave an evasive reply! If I had only said this to the judge and not that.’ When the trial ended, the arguments immediately began strictly in

accordance with the provisions of the Code of Civil Procedure, 1908. And we had to be extremely vigilant to take the necessary objection to a question asked by our opponent to his own witness if the question was either irrelevant or 'leading' (a leading question is one that suggests the answer which the lawyer putting the question wishes or expects to receive; this is impermissible in law). All this involved intense concentration and helped to train the mind by sharpening it.

Unfortunately, such invaluable experience is denied to many young practitioners of today because of the surfeit of writs (or writ petitions under Article 226 of the Constitution) where the rules of pleadings are relaxed. In fact, they are not even prescribed. The casualty has been precision and exactness. We now have more prolixity in courts, and a vast amalgam of ill-digested facts and an improvident application of the law to the facts.

In the 1950s and 1960s – in fact, till I moved to Delhi in 1972 – commercial causes in the Bombay High Court were heard and decided within six to eight months after they were filed. In answer to the plaint, only 'points of defence' were called for; there were no lengthy written statements as in other civil suits. And judges ('charged by the chief justice with commercial business' – that's what the high court rules said) would specially sit on Wednesdays to dispose of commercial causes. With the cooperation of the Bar, expeditious disposal of commercial litigation was the order of the day. In fact, I remember Sir Jamshedji telling us about the surfeit of commercial litigation after the First World War (1914–1918) and how this was admirably (and also most summarily) disposed of by the famed Scottish judge, Sir Norman MacLeod. Even after he was appointed chief justice of Bombay (1919 to 1926), MacLeod continued quite often to sit singly on the original side, and deal with commercial causes. He would try nearly a hundred commercial cases in a day. He had a penchant for commercial actions. When the suit was called out, there would be a three-minute summary by counsel for each side, and the judge with his piercing blue eyes (you can see them in the portrait in one of the court rooms on the second floor of the high court) would simply ask two questions: the first being, 'Was the market going up or going down on the date of breach?'; and the second, 'Was the plaintiff a buyer or a seller?' And depending on the answer to each of the two 'catch' questions, he would write, 'Suit decreed' or 'Suit dismissed'. Such was the confidence of the Bar in their judges in those bygone days (and what a galaxy there was at the Bar – Coltman,

Bhulabhai Desai, M. A. Jinnah, Chimanlal Setalvad, Jamshedji Kanga …) that no one questioned the wisdom of the decree or the dismissal of the suit – nor was any complaint heard about want of reasons! The answer to the two questions effectively decided the question of breach. The question of damages (if the suit was decreed) would be referred to the commissioner for taking accounts – an officer of the high court. In fact, it is said that Justice MacLeod did not mind being reversed in appeal (which was rare) by a division bench of two (puisne)[5] judges of his own court. He once told Sir Jamshedji that all a judge needed to decide a case was a table and a chair, and if these were housed in a building, it would be an extra luxury!

Most of the counsel in my time – those who often appeared in commercial causes – were terse and to the point. You just could not say too much in a commercial cause. Even the evidence was limited, and cross-examination permitted only on relevant points. Of course, there were a few senior lawyers, very able but also very long-winded. One of them was the late Vicaji Taraporewalla. Once in a commercial cause argued by Taraporewalla, the opening of the case went on for two whole days (somewhat of a record at the time). It was before Justice J. B. Blagden (an English judge who had a brilliant academic career; he was a fellow of All Souls College, Oxford).[6] The appeal from Justice Blagden's judgment was heard (after Blagden J had ceased to be a judge of the Bombay High Court in November 1946) by a division bench of the Bombay High Court – presided over by Chief Justice M. C. Chagla. There was some controversy as to whether a particular point had or had not been argued by Counsel Taraporewalla in the trial court. Chief Justice Chagla said, 'Let us send for the judge's notes.' And promptly, the judge's notes (Justice Blagden's notes of the hearing before him) were produced. They contained only the following entries written in a fine hand:

> (Date) – 11:00 a.m. – Mr Taraporewalla begins.
> 2:45 p.m. – Mr Taraporewalla continues.
> (Next day) – 11:00 a.m. – Mr Taraporewalla goes on – Oh God.
> 4:00 p.m. – Mr Taraporewalla concludes – Thank God.

But, don't be under the impression that Vicaji Taraporewalla was a bore. He was what in England would be known as a good chancery lawyer. The

anecdote does not, in any way, detract from the able way in which he conducted his client's cases.

I conducted several commercial cases before the judges sitting in the commercial court on Wednesdays – examining witnesses, cross-examining them, sometimes asking the one-too-many question in cross-examination (which was always fatal!). Justice K. K. Desai, who frequently sat in commercial matters (in my time), had a roaring commercial practice before he went on to the bench. As a judge, he kept his hand on the pulse of the case and had a native shrewdness. An admirable quality of his (Justice K. K. Desai) was that if he decided a case against a particular party after hearing the evidence, he would always recuse himself [7] when another case of the same party was called on – no matter what that case was; an example which judges in the present day would do well to emulate. Never give a party the impression (which parties in court generally carry with them) that if a particular case is decided against them, the same judge (knowing human proclivities) would decide likewise – in disregard of the real merits. Giving the appearance of justice to a party is as important as administering of justice itself.

Commercial litigation sometimes produced strange results. Some parties simply could not resist pressing upon the judges who decided their cases the items of commerce that they dealt in. And thereby hangs a tale (my source is Sir Jamshedji). In an appeal in a commercial cause between traders, Sir Jamshedji Kanga stood arguing a potato merchant's appeal before a bench consisting of Chief Justice Sir Norman MacLeod and Justice H. C. Coyajee ('Senior Coyajee' – as we called him; he was the father of Justice N. H. Coyajee). Each of judges was made in a different mould; MacLeod was a robust judge endowed, as most Scotsmen are, with a fund of common sense; his portrait hangs in the High Court in the room next to that of the chief justice. The older (but junior judge) Coyajee was a studious, God-fearing person (one whom Lord Denning would have described as a 'timorous soul', not a 'bold spirit').[8] Well, when the appeal got going and the judges were closely questioning Kanga on its merits (or rather on its demerits), the following conversation took place (later related by Coyajee to Kanga, and years later by Kanga to us in the chambers):

> COYAJEE: (leaning over in a whisper) Chief, do you see that man bobbing up and down behind Kanga?

MACLEOD: Yes – he is Kanga's client.
COYAJEE: Do you know he had the audacity to come to my house last evening to deliver a bag of potatoes.
MACLEOD: (smiling) And what did you do Coyajee?
COYAJEE: Of course, I asked him to instantly leave with his gift.
MACLEOD: What a pity. Coyajee – I assure you they were excellent potatoes!

Seeing the look of horror on Coyajee's face, MacLeod then added, 'Do you really think, Coyajee, that a bag of potatoes is going to make any difference as to how we decide this case?' Of course, the potato merchant's appeal was dismissed!

* * *

In 1962, the Bombay High Court was 100 years old,[9] and the judges resolved to celebrate the event by commissioning a history of the court. Advocate and scholar P. B. Vachha was requested to undertake the work. He stipulated at the very start that he should have a free hand to write in his own way, and to freely express his views and comments on men and matters. This being agreed, the work later titled *Famous Judges, Lawyers and Cases of Bombay* was duly completed. In the chapter on historical cases (Chapter XV), Vachha described the Second Tilak Trial (1909), setting out the facts and events relating to the trial for sedition of Bal Gangadhar Tilak in respect of certain articles published in the popular daily *Kesari* in May–June 1908. Tilak defended himself at the trial, and in his address to the jury (in those days there was always a jury in a notable criminal trial) Tilak made some very good points. In his charge to the jury, the presiding judge – Justice Dinshaw Davar instructed the jury that a journalist could criticize the government as strongly as he liked but he had no right to attribute dishonest or immoral motives to it – and he summed up against Tilak. The jury, by a majority of 7:2, returned a verdict of guilty. On being asked by the judge whether he had anything to say, Tilak uttered the following, now memorable, 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.

The judge then sentenced Tilak to six years' transportation (i.e., confinement in the Andaman Islands) and a fine of Rs. 1,000. While passing the sentence, the judge indulged in some scathing strictures about Tilak's conduct. He condemned the articles as seething with sedition, preaching violence, and speaking of murders with approval. 'You hail the advent of the bomb in India as if something had come to India for its good. I say, such journalism is a curse to the country,' said the judge. According to Vachha, Tilak's trial, even if legally justified, was a grave political blunder – aggravated by the judge's intemperate strictures on the popular patriot, whom the judge described as a man with a 'diseased and perverted mind'.

All this was said by Vachha in felicitous prose, and it was acceptable to the committee of judges under whose auspices the history of the high court was being written. But then Vachha added a postscript to the Second Tilak Trial. In it he also criticized an event that took place in 1959 viz. the unveiling of a marble tablet fixed outside the court where Tilak was tried. On the tablet is inscribed Tilak's protestation of innocence (cited above: 'in spite of the verdict of the jury …'); Chief Justice Chagla unveiled the tablet in Tilak's memory. In the postscript, Vachha not only criticized Chagla's speech at the unveiling of the tablet but the very idea of a memorial tablet in the high court that atoned 'for the misdeeds of previous generations'. He characterized Chief Justice Chagla's speech as 'admirably patriotic, or patriotically admirable; but legally and judicially inexplicable and indefensible', and as being delivered from a wrong platform. Vachha said that the tablet taken in conjunction with this (Chagla's) illuminating speech was also unfortunate as it established a very undesirable precedent. And he went on:

> If successive generations of judges, with fluctuating loyalties and ideologies, are to be at liberty to put up memorial tablets, 'atoning' for the misdeeds of previous generations, there would be no end of such memorial tablets; and judges henceforth will have to decide cases with an eye not to the law and evidence, or even to the Supreme Court, but

> to the 'Inevitable verdict of History', which, of course, is to be taken as always infallible and final. Pace Herodotus, Tacitus, Gibbon and Macaulay! In point of fact, the verdicts of History are no more inevitable or infallible than those of judges and juries; and, in any case, are utterly irrelevant in the context of judicial pronouncements. It is also an irony of human life that the 'inevitable verdict of History' occasionally overtakes us sooner than we anticipated.[10]

Chief Justice Chainani and his colleagues (which included Justice Y. V. Chandrachud and Justice Tarkunde) bridled at this criticism of Chagla as well as Chagla's tribute to Tilak when unveiling the memorial tablet outside the court where he was tried. Vachha claimed the historian's privilege of writing whatever appeared to him to be correct, and despite persuasion refused to omit the postscript or alter any part of it. He told the judges that he had followed the advice which was given to India's great historian Ferishta by Ibrahim Adilshah, when Ferishta migrated from the Nizam Shahi court at Ahmadnagar to the Adil Shahi court at Bijapur. 'Write,' that liberal monarch had said, 'write without fear or flattery.' Vachha said that fear and flattery for the powers that be are the worst enemies of historical truth, and vitiated a history at its very source – 'If a writer is influenced by these unworthy and unmanly emotions and motives, his work becomes not only dishonest, but insipid, humdrum and featureless.'

All this of course led to an impasse. The judges remained adamant, and so did Vachha. As a result, the history of the Bombay High Court for the first 100 years had to go without the imprimatur of being an official version; but no matter. Headed by K. M. Munshi, H. M. Seervai and one or two more seniors, along with some juniors like Atul Setalvad and myself, a committee was formed which was entrusted with the task of having the book published – privately. Funds were collected and ultimately this book – unfortunately now out of print – was published by law-publishers N. M. Tripathi Pvt. Ltd. The book has remained a classic.

The Chartered High Courts of Calcutta and Madras are as old as the Bombay High Court but the histories of those great institutions have not found their Boswell. The Bombay High Court alone has the distinction of having an admirable record of its *Famous Judges, Lawyers and Cases of Bombay*. I am proud to have been associated with the publication of this book.

* * *

During my years in Bombay, I had the advantage of being briefed in varied courts – not only in the high courts, but in district courts as well.

In 1961, Goa along with Daman and Diu – erstwhile Portuguese Overseas Territories – were 'liberated' (the Portuguese say 'invaded'!) and then declared a union territory. I was quite frequently briefed to appear in the courts of Goa. For many years, large parts of the law in Goa remained anchored in Portuguese civil law, though governed by India's procedural laws. For me, this strange mismatch was a new, fascinating experience. Prior to 1961, the highest appellate court for the Portuguese Overseas Territories was the 'Tribunal de Relacao' functioning at Panaji (it was one of the oldest courts in Asia). This Tribunal de Relacao was abolished when the court of judicial commissioner was established on 16 December 1963 under the Goa, Daman and Diu (Judicial Commissioner's Court) Regulation, 1963. In May 1964, an act was passed by the Indian Parliament which conferred upon the court of judicial commissioner some of the powers of a high court. Later, in December 1982, Parliament extended the jurisdiction of the high court at Bombay to the union territory of Goa, Daman and Diu, and established a permanent bench of that high court at Panaji. Dr Justice G. F. Couto who was judicial commissioner at the time was elevated to the bench of the high court of Bombay (at Goa). I appeared before him on several occasions. He looked resplendent in court in his long black robes and embroidered cravat ('bands') which was how judges were dressed in the Portuguese tradition.

I was also briefed, not infrequently, before the district court in Poona (now Pune); the district court there was one of the premier 'Mofussil'[11] Courts in Maharashtra. There was more pomp and panoply in the court of the district judge than in the high court of judicature at Bombay! Whenever the district judge entered his courtroom a caparisoned *chopdar* would precede him and in a loud voice command 'silence'. Cases were called out in the district courts, not by the name of the parties but by the names of the advocates, loudly announced by 'callers' from corridor to corridor in the expectation that the concerned advocate would soon turn up. To accommodate counsel from the high court, judges in Pune were often kind enough to fix a Saturday for hearing a case, and some of us could then leave

Bombay by the famed 'Deccan Queen' (an Indian passenger train) on a Friday evening, attend early morning court on Saturday and return to Bombay on Saturday evening! Convenient, but also rewarding.

I was once briefed by Sorab Vakil, senior partner of Messrs Payne & Co., to conduct a case in the district court in Poona. Sorab was one of the most painstaking and assiduous of solicitors; he not only expected but *demanded* that the counsel he briefed be fully prepared – and saw to it that he was! The trial in which I was engaged by him went on for over three weeks before (what was known as) the civil judge (senior division) – a peg below in rank to the district judge. The case involved witnesses who had to be cross-examined. The judge was of a literary bent and quite scholarly: I recall that Senior Advocate Y. B. Rege opposed me in that case (Rege was the junior of F. J. Coltman, and when Coltman retired and went permanently to the United Kingdom, Rege inherited Coltman's chambers on the ground floor of the high court building). The judge who tried our case was snuff-addicted; every hour or so he would take out his snuff-box and inhale a pinch of snuff, during which he would relate a literary anecdote, in the expectation that counsel on each side would respond! So both Rege and I had to stock up on jokes and stories during the four-hour hearing each day! After the ritual of story telling was over, the presiding judge would then announce the resumption of proceedings (in crisp Marathi) – '*Ata-Chala!*' (Now let us proceed).

I never missed an opportunity to appear in the court of chief presidency magistrate (CPM) – at the Esplanade – in my time there was only one CPM. In addition to his several functions, he also administered admiralty jurisdiction (criminal) for cases involving damage to ships or collision of ships in the harbour – in such cases he would sit with two specially appointed naval assessors to guide him. It was quite a fascinating variant to the normal humdrum of civil cases in the high court.

I was also frequently briefed in the presidency court of small causes in Bombay, not in its ordinary civil jurisdiction, but in its exclusive jurisdiction under the Bombay Rent Act, where an astute lawyer, Dadi Vicaji Patel, was in top practice. We frequently opposed each other in court but were the closest of friends outside it! He was a leader of the Bar in the rent court. I have always believed that the more varied the experience of the practising lawyer the better he (or she) becomes.

Notes and References

1. Justice Chagla resigned prematurely in 1958 when he was appointed India's ambassador to the United States of America; later he was appointed minister in successive governments at the centre.

2. There are two classes of advocates under the Advocates Act, 1961, viz. 'senior advocates' designated as such by the high court or by the Supreme Court in view of their ability or status at the Bar, and 'other advocates'.

3. Badruddin Tyabji was the first Indian to be called to the English Bar (1867), and then the first Indian barrister in Bombay. He entered public life after three years at the Bar. Along with Kashinath Telang and Pherozeshah Mehta, he formed the 'Triumvirate' that presided over Bombay's public life. He was president of the third session of the Indian National Congress (Madras, 1887) and justice of the Bombay High Court (from 1895); he acted as chief justice in 1902 again, the first Indian to hold this post in Bombay.

4. There are strict rules for proof of documents contained in Chapter V of the Evidence Act, 1872.
   The contents of document are to be proved either by 'primary' or 'secondary' evidence, i.e., the document itself produced for inspection of the court with evidence as to who prepared it or wrote it (primary evidence) or (if that is not available) then an oral account by some person who has seen it (secondary evidence).

5. A puisne judge is a young or junior judge – a judge other than the chief justice.

6. Every year, the top finalist of the university (All Souls College, Oxford) in the humanities is invited to sit for the examination in classics, English, economics, history, law, philosophy and politics

for a fellowship of the college – only two are elected to the fellowship and they are known as the ‘prize fellows’.

7. A judge recuses himself from a case where he/she voluntarily disqualifies himself/herself from hearing the case.

8. In *Candler vs Crane, Christmas & Co*., (1951) 2 KB (Kings Bench) 164 at 178 and 195, Lord Denning (then lord justice) delivered a dissenting judgment answering a plea raised by counsel that no action had ever been allowed for negligent statements, and want of authority was a good reason against it being allowed in the case being decided. Lord Justice Denning was not impressed:

This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If you read the great cases of *Ashby v. White*, *Pasley v. Freeman* and *Donoghue v. Stevenson* you will find that in each of them the judges were divided in opinion. On the one side there were the *timorous souls* who were fearful of allowing a new cause of action. On the other side there were the *bold spirits* who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.

9. The high court was established by Royal Charter pursuant to the Indian High Courts Act, 1861, passed by the British Parliament. The Crown was empowered to establish high courts of judicature at Calcutta, Madras and Bombay. Prior to this, there were the Mayor’s Court, the Recorder’s Court and the Supreme Court of Judicature at Bombay, established by the statute of 1823.

10. *Famous Judges, Lawyers and Cases of Bombay – A Judicial History of Bombay during the British Period* (1962), P. B. Vachha, N. M. Tripathi Pvt. Ltd., Bombay, pp. 270–271.

11. ‘Mofussil’ is an Anglo-Indian word derived from Urdu: literally, ‘beyond the four walls of a city’ or ‘up-country’; ‘rural’.

Chapter 4

Lawyers and the Legal Profession

We demean ourselves and our profession when we resolve to strike work, and (so) paralyse the working of courts, tribunals and statutory authorities where public cases and causes demand our expertise, intercession and assistance. We also discredit ourselves and our profession when we curry favour with those in authority and power, and do not stand up and defend the rights of citizens.

*L*ooking back over the past 60 years, the legal scene has changed. Judicial review is now the order of the day and nothing is beyond the scrutiny of the courts – sometimes, a good thing too. We live in what a famous English judge (Lord Browne Wilkinson) has described as the 'Go-Go-World of Judicial Review' (a pejorative reference of the extent to which modern-day courts of law extend their sphere of influence, stepping outside the limits of judicial propriety)![1] There are now a plethora of courts and a proliferation of tribunals, and no one, with any competence and the will to work, can fail (or should fail) to find a berth. The question is where and when to join? The answer is – not necessarily in the Supreme Court. Certainly not at the beginning of one's career. I never even saw the Supreme Court building – let alone appearing before the judges there – until I was 15 years into the profession! However, whilst we have gained – in that there are now more courts, more tribunals, more opportunities for work and more openings for the practising lawyer of today – the lawyer's image has diminished compared to what it was when I joined the Bar. In public esteem today, we practising lawyers are weighed in the balance and now found wanting.

Lawyers were at the vanguard of the freedom movement. The practising lawyer was given a pride of place in our Constitution. In the fundamental rights chapter itself, in Article 22 (1), it is proclaimed that no person who is arrested 'shall be denied the right to consult with and be defended by a lawyer of his choice'. When the Advocates Act was passed in 1961, it was intended that lawyers should be entitled – as of right – to practise throughout India in all courts, in all tribunals, and before all persons authorized to take evidence (Section 30). It has been nearly 50 years since that law was enacted but Section 30 has not yet been brought into force! (Under our jurisprudence, a law can be enacted by Parliament or a state

legislature but generally it comes into effect only when brought into force by a notification of the government.)

What are the causes for this distrust of the legal profession?

In his exhilarating Hamlyn Lectures,[2] Lord Justice Stephen Sedley – one of England's brightest judges – reminds his readers that the *rule of law*, of which we in the democracies speak so glibly, is a necessary but not a sufficient condition of a decent society. There is more to a decent society than the rule of law. For instance, judicial enforcement of rights by courts of law does not necessarily guarantee public understanding and support for those rights; such understanding or awareness needs to be inculcated and can only be achieved by education. And if lawyers are to be educators, they must be trendsetters inspiring public confidence.

Although our country's lawyer-to-people ratio is 1:1800, and compares poorly with developed countries like Great Britain (where it is 1:300), mere numbers and statistics do not disclose the real malady. The quality of legal education is more important than the numbers of lawyers. What matters a great deal in India is the quality of law teachers and professors, and how they are treated. In his first G. S. Pathak Memorial Lecture delivered in New Delhi a few years ago, Lord Goff (then one of the seniormost law lords in England) said that the difference between Germany and England was that in Germany 'the Professor is God: But in England the Judge is God'. In India too, the judge is God! But we have to give much better status and recognition to our law teachers, who initially move the hearts and mould the minds of law students. It is law students who become practising lawyers, and it is the bright ones amongst them that become judges.

One most serious aspect facing the legal profession is that the legal education system appears to have lost its ethical content. The education of a practising lawyer (you must remember) never ceases. It continues throughout his career, and I would suggest that the national bar associations adopt a three-point programme:

First, the urgent need to re-discover and reaffirm the profession's 'moral foundation' (that will help refurbish its image).

Second, to inculcate ethical principles in the minds of young lawyers (and do remember people learn best by example, not by precept).

Third, to promote morally responsible and responsive lawyering, or as they say, 'Make lawyers good'.

An interesting book published ten years ago[3] contains a series of fascinating articles wherein they all seek ways to accomplish what is called the ‘re-ethicalization’ of lawyering. The basis for this movement is a belief that the legal profession is in the midst of a crisis of identity. It stands ‘exiled from its old certainties’ and from its central position as guardian of society. The image and self image of lawyers, says the editor of this book, risks some remoulding due to the current sense of crisis, and cynicism: what he calls ‘ethical bankruptcy’.

We must ponder a little, and consider, without recrimination or rhetoric, the present-day standing of the practising lawyer in India and in the Commonwealth, for it is at times good to see ourselves as others see us. The picture in several countries (including our own) is not a very flattering one. And what is the cause?

No one has stated this more eloquently, or with greater brevity, than that master of the English language, William Shakespeare:

> Men at some time are masters of their fate:
> The fault, dear Brutus, is not in our stars,
> But in ourselves that we are underlings.
>
> Julius Caesar, Act I, Scene II

Several centuries later (in 1984), Lord Leslie Scarman (a British barrister and distinguished judge) said much the same thing in many more words. At a conference of the Law Society of New Zealand in 1984 (to which I was invited as a speaker), the law lord expressed some home truths about our profession. He said that lawyers must not arrogate to themselves a position of dominance in the society they serve, but ‘their position as servants of society … is indispensable’. And he went on to say:

> The ordinary tough, robust Englishman, whether he runs a petrol filling station in Shropshire or sells suspect goods from a barrow in the East End of London will say, although he won’t put it as delicately as I shall, that the law is an ass.
>
> But he will never say lawyers are idiots. He may say they are too expensive. He may say they are far too wealthy. But he will, and does, respect them. The law may fall into disrepute but lawyers do not,

> unless they themselves create the circumstances in which they can become disreputable.

Yes; we do become disreputable (and dispensable) when we choose, at our own pleasure, not to appear for clients in courts, tribunals and authorities before which we have a special privilege and right to practise. We demean ourselves and our profession when we resolve to strike work, and (so) paralyse the working of courts, tribunals and statutory authorities where public cases and causes demand our expertise, intercession and assistance. We also discredit ourselves and our profession when we curry favour with those in authority and power, and do not stand up and defend the rights of citizens.

We need to remember what the greatest of American trial lawyers (Clarence Darrow)[4] said:

> I have never turned my back on any defendant no matter what the charge; when the cry is the loudest the defendant needs the lawyer most; when every man has turned against him the law provides that he should have a lawyer. I can honestly say *I have kept the faith*.[5]

Eloquent words, words for every lawyer to live by.

However, notwithstanding the lawyer's foibles and weaknesses, ordinary people do respect lawyers, and this is true in India as well. Before hearkening to William Shakespeare's advice, 'The first thing we do, let's kill all the lawyers,'[6] we better be clear about who or what will replace them. The truth is that people – ordinary people (though not those working for governments) – regard lawyers as more equal than themselves. They look upon lawyers as trained to use the freedom granted by the country's constitution, as persons who know better than ordinary people how to use this freedom. In times of grave crisis – constitutional or national – they look at lawyers (and associations of lawyers) to see how they react. They have done so in the past – and will continue to do so in the future.

The reason for this I believe is because, over the years, often without the support of any legal or constitutional guarantees, lawyers in most parts of the world have shown their true mettle. When times are bad, bar associations and its members are at their best. Also, bar associations and its officials are applauded (and remembered) for standing up and not being

afraid of being counted. Post 26 June 1975, when the Internal Emergency was clamped (more of which, later), Senior Advocate Ram Jethmalani, a lawyer cast in a heroic mould (you could wake him up in the dead of night and he would be ready for legal battle!), had made a hard-hitting speech at Palghat (in Kerala) against the imposition of the Emergency, and as a result was much sought after by police officers around the country, equipped with sniffer dogs and armed with a detention order and arrest warrant. Some of his friends filed a petition in the Bombay High Court for a stay of his arrest. What was uncommon about that case was not its subject matter or the result, but that 200 practising lawyers put their names down as appearing for him! Edmund Burke used to say that the study of law 'renders men acute', and that 'they are able to augur misgovernment at a distance and sniff the approach of tyranny in every tainted breeze'.[7] That is our strength; that is why we are also feared, particularly by those in power and authority.

Lord Atkin once said that an impartial administration of the law is like oxygen in the air; people know and care little about it till it is withdrawn.[8] When it was withdrawn in India during the Internal Emergency (June 1975 to January 1977), the majority of those who stood up and were counted were the country's practising lawyers. They openly fought the insolent might of the establishment, espousing human rights' causes. The organizations established during this contrived (or phoney) Emergency for upholding civil liberties are flourishing today – Citizens for Democracy; People's Union for Civil Liberties; People's Union for Democratic Rights; and a host of other non-governmental organizations (NGOs). They are manned and led mainly by lawyers.

An increasing number of practising lawyers (as well as former judges, academic lawyers and law journalists) are now crusading against varying forms of injustice and exploitation, and assisting in promoting change and development in favour of the poor and the deprived, particularly through the expedient known as PIL (public interest litigation);[9] an innovative technique developed by India's judges with the active assistance of the legal profession.

But with all this, neither an independent legal profession nor a bar association can ever hope to survive without public support – neither in India nor elsewhere.

I recall what my late lamented friend and colleague, Justice Dorab Patel (of Pakistan),[10] said in his keynote address to a seminar held by the

International Commission of Jurists (in Kathmandu in September 1987), 'In the long run the manner in which judges and lawyers discharge their duties can build up public opinion and public opinion is a better safeguard for the independence (of judges and lawyers) than any law or constitutional guarantees.' Dorab knew what he was talking about. He had raised a groundswell of public opinion (in his favour) when he preferred to resign as judge of his country's Supreme Court, rather than take a fresh oath of office to the martial law administrator under the then newly promulgated Constitution of Pakistan. What he said is not restricted to his own country. It applies elsewhere also. We could all do well to take heed.

Notes and References

1. From an article by Michael J. Beloff, 'Judicial Review – 2001: A Prophetic Odyssey', *Modern Law Review*, Vol. 58 (1995), March issue.

2. The Hamlyn Lectures – Fiftieth Series – *Freedom, Law and Justice* (1999), Sweet and Maxwell, London, p. 9.

3. *Intellectual Property and Private International Law* (1998), James J. Fawcett and Paul Torremans, Oxford Hart Publishing Ltd., London.

4. *Clarence Darrow for the Defence* (1941), Irving Stone, Doubleday, Doran and Company, Garden City, New York, p. 369.

5. An idiomatic expression first used by the Christian Apostle, St Paul – 'I have fought a good fight. I have finished the course. I have kept the faith.' (The Holy Bible – *The Second Epistle of Paul to Timothy* iv).

6. William Shakespeare, *King Henry VI* – Act IV, Scene 2.

7. *Burke Selected Works*, Vol. 1, New Edition (March 1874), E. J. Payne, Oxford at the Clarendon Press, London, p. 183.

8. *Lord Atkin* (1983), Geoffrey Lewis, Hart Publishing (Reprint Edition, 1999), Oxford, p. 176. In 1940, Lord Atkin wrote to the Australian High Court judge, H. V. Evatt (later Australian attorney general), as follows:

How little the public realise how dependent they are for their happiness on an impartial administration of justice. I have often thought it is like oxygen in the air. They know and care nothing about it until it is withdrawn.

9. In a book recently published, *Judicial Activism in Common Law Supreme Courts* (Edited by Brice Dickson, Oxford University Press, 2007, p.121), one of the chapters is devoted to India. The author of this chapter (Professor Venkat Iyer) writes (with accuracy and frankness) that 'the Supreme Court of India has displayed a remarkable capacity for creativity, resilience and ingenuity in meeting the myriad challenges thrown up by a society that is characterised on the one hand by deep religious, linguistic and other fissions, rampant maladministration, endemic corruption, acute economic under development and widespread poverty, and (on the other hand) by a political system in which adherence to constitutionalism and the rule of law has been far from steady.'

10. Dorab Patel was a judge of the Supreme Court of Pakistan. After his resignation he was elected a member of the International Commission of Jurists, Geneva – this was when I first came to know him.

Chapter 5

Lessons in the 'School of Hard Knocks'

... it is better to spend more time thinking about a case than merely reading the brief.

I am frequently asked by law students around the country as to how a lawyer must prepare for and argue important cases. The only appropriate answer I can offer is, 'As best as you can.' Robert H. Jackson (who was solicitor general of the United States in the late 1930s) wrote, after he became an associate justice of the US Supreme Court (1941 to 1954), that as a practising lawyer he found that he made three arguments in every case: the one he *planned* ('logical, coherent, complete'); the one he *presented* ('incoherent, disjointed, disappointing'); and the one *he did not make* ('the utterly devastating argument that I thought of after going to bed that night!').[1] I have often had the same feeling!

There are lessons to be learnt in this 'school of hard knocks' (euphemistically called 'the Bar') in which all lawyers get their training. Those lessons are traditionally handed down by seniors to younger members of the Bar. The most important lesson I had learnt was from C. K. Daphtary (Chandubhai). He once quite casually passed it on to me when my wife and I entertained him – and his wife, Cicily – to dinner in our flat in Bombay, more than 30 years ago. He said (and he was not the kind of man who would preach to the young), 'Always remember, Fali, it is better to spend more time thinking about a case than merely reading the brief.' This is an advice that I have found invaluable in my entire working life.

In keeping with the time-honoured tradition in the profession, let me (in my turn) set out some of the 'dos and don'ts' that I have imbibed during my sojourn at the Bar for the past 59 years. It is done in the spirit of that anonymous bit of verse that I first picked up in school: 'Advice is nice / On it I've thriven / Not mother's or other's / But what I've given!' Here it is:

(1) Let your opinions be honest and responsible. Never begin a suit or an action unless you are satisfied that your client has

evidence to substantiate his claim in a court of law. Unless of course your client is like the one in the story (a true story) about Sir Dinshaw Mulla, privy councillor and India's foremost jurist in the 1930s. The late Reginald Mathalone, one of Mulla's juniors, is my source. One Manekji Pochkhanawalla (pronounced Poch-Khana-wala), then a senior partner in M/s Wadia Ghandy & Co. (a firm of solicitors in Bombay), wanted advice as to whether his client had a case that would stand up in court. He approached Mulla in his chambers and stated the facts. Mulla listened and then shook his head, 'No, no, no. There is no case.' 'But what if we put it this way Sir Dinshaw?' the Solicitor persisted. Again the shake of the head, 'No, no, no – no case.' But the solicitor would not give up, 'Sir Dinshaw, suppose we say this …' Mulla was firm, but he wasn't dense. He could see that the solicitor desperately wanted his client to file a suit! So Mulla tactfully enquired, 'Tell me Pochkhanawalla, is your client a sporting chap?' The client, who was himself present, chipped in, 'Yes sir, I am a sporting chap.' Then 'fire away', said Mulla. The client 'fired away' and the suit was filed; it was ultimately dismissed with costs. The client was poorer by Rs. 30,000 – a large sum of money in those days! The moral of this story is – *Don't let your client lapse into the 'sporting-chap' syndrome*.

(2) The essence of good *lawyering* is acquainting oneself with the relevant law, including case-law, on the subject at hand. The essence of good *advocacy* is to know the facts of your case, and then apply the law to those facts. Over the years, it has been my experience that some budding young practitioners are much too 'case-law oriented': they attempt to 'accommodate' the facts of the case in hand with decisions of Courts given in other cases. Wrong! Be abreast of the case-law but never be accused of that legal malady called 'case-law-diarrhoea'! Another instance of bad advocacy is repartee – responding in Court to wise-cracks or insults that may be hurled at you during a hearing by an irascible opponent. You would be well advised to ignore them:

do not retaliate. It does not help to win cases; it could even contribute to losing your case.

(3) When you argue a case in court, be clear and precise, not confused. Your mental output must flow. And for it to flow you must be well equipped and well prepared. Someone said disparagingly about a lawyer that his mental output was like a plate of scrambled eggs – wholesome but messy. Don't be messy. Present a cogent and logical argument. Think like a lawyer and not like a philosopher. Your head must not be up in the clouds. And, respond to the court's question promptly even when the question puts you off the track of your argument. When a judge wants to know something you must tell him *now* – not later. Dr Kailas Nath Katju who practised in the High Court of Allahabad from 1914 till 1937, reportedly told his juniors that the best way of conducting an argument in court was to give ready and precise answers to the judge, 'Give your answer first and present your own point afterwards' – an excellent piece of advice for success in court.

(4) Keep yourself informed and be up to date with all the reported judgments and decisions of the Supreme Court and of the high courts. In this way you will be useful to yourself if and when you are briefed in a case, or even when not briefed whilst watching someone argue in court, you could be helpful to him. Sir Jamshedji Kanga had little work in his first few years of practice (in those days there was much less work for juniors than there was even in my time). Kanga told us that he spent his time reading all the opinions of the Privy Council[2] (from the first volume of *Indian Appeals*) and the judgments of the high courts (from the first volume of the *Indian Law Reports* series). This he would do in the evenings. During the day he would sit in various courts, imbibing the difficult art of how to argue, and (more importantly) how *not* to argue a case – merely by intelligently watching others perform!

(5) Lessons on advocacy are often imbibed from the great and successful. Quintin Hogg – later Lord Hailsham of St Marylebone[3] – writes about the very useful lesson on advocacy that he (then a totally inexperienced pupil at the Bar) learnt from Wilfred Greene MR.[4] The master of the rolls had been a great classical scholar and a superb judge of law on appeal who wrote many judgments, still quoted in the courts. But, being a chancery barrister, no one at the time rated him at his true worth as an advocate. He hated examining and cross-examining witnesses, and in his last years at the Bar, he virtually confined himself to advocacy in the appellate courts. Quintin Hogg was sitting next to him one night at dinner, when he (Wilfred Greene) suddenly asked him a question (and I let Lord Hailsham take over).

GREENE: Supposing you were instructed in a case where you had two points to argue, both of them bad, but one worse than the other, which would you argue first?

HAILSHAM: I suppose I would argue the less bad of the two.

GREENE: Quite wrong. You must argue the worse, and put your very best work into it. Eventually they will drive you into a corner, and you will have to admit defeat. You will then say, 'My Lords, there is another point I am instructed to argue. But I am not quite sure how to put it.' And you will then put the better of the two arguments, but not quite as well as it could or should be put.

(After a little while) One of the old gentlemen on the Bench will interrupt you. He will say, 'But surely Mr Greene, you might put it in this way.' And he will put it exactly as you really ought to have put it in the first place. At that stage you will lay your papers on the desk before you. You will raise your eyes to the ceiling. And, in an awestruck voice, you will say, 'Oh, My Lord, I do believe …' And then you will be at least half way to winning your case.

(6) One of the best instances that I have heard of as to how well prepared a lawyer must be is that of the legendary Vishwanath Sastri who practised in the Supreme Court of India from the year 1956 to 1963. It was recently related to me by my friend Srinivas Murthy of Hyderabad who has been practising at the Bar for almost as long as I have, and in the old days we frequently appeared together in the Supreme Court. When a couple of years ago, my wife and I attended a convocation at the National Academy of Legal Studies and Research (NALSAR) University of Law (near Hyderabad) – where I was conferred by the chancellor, President A. P. J. Abdul Kalam, the degree of Doctor of Laws (honoris causa)[5] – Murthy came and called on us that evening. He told me something which Justice K. Subba Rao (a relative of his) had told him. Somewhere in the mid 1960s in a case presided over by Justice P. B. Gajendragadkar (sitting with him were Justice K. Subba Rao[6] and Justice R. S. Bachawat), the great advocate, Vishwanath Sastri (his portrait – not a very good likeness – hangs in the advocate's lounge in the Supreme Court) was arguing in his inimitable 'soft-but-sure' manner, when Justice Bachawat (a fine judge who had the law on his fingertips) reminded Sastri that the proposition he was then canvassing for was directly contrary to what the Privy Council had said in a case which Justice Bachawat recollected and mentioned. Silence for just an instance, and then came Vishwanath Sastri's reply:

Yes, My Lord, and that is the only decision of the Privy Council that has been adversely commented on in *Halsbury's Laws of England* in volume [such-and-such].

This was too much for Justice P. B. Gajendragadkar (also a scholar-judge). He said, 'Let us suspend the proceedings – send for the decision of the Privy Council, and send for the volume of *Halsbury* mentioned by Mr Sastri.' The books were brought in and sure enough there was the judgment of the Privy Council as Justice Bachawat had recollected; and equally surely there was that passage in *Halsbury's*

Laws of England which commented adversely on the opinion of the Privy Council! This is how well prepared lawyers (and judges) must be.

Another instance of intellectual excellence that I can recall – this time of academic writing – is when I was practising in Bombay. The great international trademark lawyer, Blanco White, had been invited by K. S. Shavaksha, himself an expert in Indian Trademark Law, to lead him in a trademark case (incidentally, Shavaksha was Mulla's son-in-law). Blanco White appeared in court, of course, with permission of the chief justice. In the evening, at a reception given for him by K. S. Shavaksha, Blanco White commented upon the accuracy of *Halsbury's Laws of England*, in all its editions. He told us that he had been entrusted the task of writing the entire trademark section. He submitted it to the lord chancellor, Lord Simonds, who was the editor of the third edition of *Halsbury* (Simonds was not a trademark lawyer). A couple of weeks later, Blanco White received a telephone call from the lord chancellor's office asking him to drop in. When he did, Lord Simonds pointed out to Blanco White that two passages in his text were not supported by the cases cited! Blanco White later found that the lord chancellor was right and he was wrong, and he made the requisite correction. I have been, and I am always envious of such scholarship – it is so rarely seen these days.

(7) Parkinson's law[7] (work expands so as to fill the time available for its completion) applies in the legal profession more than in any other. The less work there is, the less inclination there is to put your mind to it. Consequently, less the experience gained, and less will be the work that will come your way – and so on in a downward spiral. The more work you have, the better the application of mind, the greater the sharpening of the mental faculties, attracting a slew of work. Here 'work' means 'being occupied', not necessarily paid work. In the profession, the worst enemy of hard work is a fixed monetary reward for there is simply no 'incentive' to work hard when your senior pays you a regular stipend!

(8) As a lawyer, it is your duty to bring to the attention of the court a case already decided on the point being argued. You may then distinguish your case from the decided case but you must cite it. Never cite an overruled case. It is improper – an instance of sharp practice. According to Kanga, there used to be a solicitor in Bombay (in the old days) – M. B. Chothia – who kept a specially compiled book containing overruled cases! When the going was rough in court he handed over the decision (which had been overruled) to his counsel – with a straight face – confounding the judge and the other side as well, till after some time it would be discovered that the case cited had been overruled! The example of the solicitor from Bombay is not to be emulated. He is only remembered as a person who did the wrong thing!

(9) In court, it is always better to understate a case than to overstate it. Never tell the judge you have a 'cast-iron case'. In nine cases out of ten, the natural urge of the judge will be to cut you down to size, and prove to you that your case is not as watertight as you profess! Justice Krishna Iyer of the Supreme Court used to quote, quite frequently (in his judgments), Oliver Cromwell's exhortation to the General Assembly of the Church of Scotland: 'I beseech you, in the bowels of Christ, think it possible you may be mistaken.'[8] Good advice.

(10) One of Aesop's fables reads, 'Don't count your chickens before they hatch.' In other words, never be too cocksure of winning cases. There are many impediments to success – one of which is the luck of the client. When I was practising in Bombay in the 1960s, I argued an appeal which involved an interpretation of some provisions of the Employees' State Insurance Act. The appeal was heard by a bench consisting of Chief Justice H. K. Chainani, ICS, and Justice H. R. Gokhale. The matter concluded on a Friday, when it appeared to me (and to everyone else in the court) that I would succeed. About a week later, Chief Justice Chainani whilst crossing the road during an evening walk on Marine Drive was knocked down unconscious by a passing motor

car, and succumbed to his injuries a month later. The appeal had to be placed for hearing before another bench – this time presided over by Justice V. M. Tarkunde, where the same arguments were advanced. But this time the judges were not with me. They were against me. The presiding judge (Justice Tarkunde) was kind enough to inform me, during the hearing, that the notes on the files of Chief Justice Chainani showed that the he was ready to deliver judgment in the case that I had argued before him, and that the judgment would have been in my favour! But it was not to be. I had counted my chickens before they were hatched!

(11) 'I have never heard of such a thing', are words to be scrupulously avoided in a court of law, especially when responding to what the judge has just said in the court. I impetuously used this phrase, when only eight years at the Bar I swore never to use it again. This was after a judge smiled indulgently and said, 'Mr Nariman you are still at the beginning of your career. In course of time you will hear and learn a lot of things that you have not heard of before!'

(12) Also, never say, 'Your Lordship will bear with me.' I used to say this quite frequently when I practised in the Bombay High Court, and the judges did not appear to mind. But then in the Supreme Court I realized that Justice A. N. Ray abhorred the expression. If you said, after an interjection from the bench, 'Your Lordship will bear with me …' pat would come the answer, 'Then what do you think we are doing upto now!' A. N. Ray was not a good chief justice, but he was a good puisne judge.

(13) Never exaggerate in court about the facts of your case or the applicable law. Avoid rhetoric, and don't be too smart. And for heaven's sake avoid being funny. You will be stigmatized either as impertinent or flippant. In fact, till you have established your reputation as a sound lawyer, never indulge in pleasantries in court. And please, never trump the judges' jokes or make it appear you are more humourous than he is. If you must tell a story, tell one against yourself, not one in your favour.

(14) It will do you no credit to put forward an absurd argument. You will be branded as too clever by-half! In a very recent case in England, the question was whether a racially obscene remark to a police officer was punishable under the Criminal Justice and Public Order Act, 1994. That remark was uttered by the accused whilst in police custody, in a police cell. The lawyer of the accused (a solicitor named House) thought he would be smart and rely on the exception in the act viz. that no such offence could be committed where the offending words were used by a person inside a dwelling *occupied as a person's home*. House argued that the prison cell was the accused's (compulsive) 'home', an argument that surprisingly found favour with the judge of first instance. But the court of appeal reversed the verdict with some harsh words about the argument:

We respect the achievement of Counsel for the defence Mr House in convincing the Judge that a police cell was a home, but sometimes early forensic success meets its nemesis in this Court. When a bright idea strikes Counsel it is useful for the advocate to remember the advice of the illustrious member of the Modern Jazz Quartet. Miles Davis advised: 'Think of a note, don't play it.' The appeal is allowed!!

(*Moses L. J. in R. vs Francis* 2007 1 Weekly Law Reports, p. 1024)

(15) *Leave your anger – and all the vitriol that goes with it – outside the courtroom*. Never take it into the court with you. If you are tempted to be angry, remember Lord Eldon. In 1787, the future Lord Eldon (then plain John Scott) had argued a case in the equity court and lost. Thirty-three years later, the same case was cited to Lord Eldon when, as lord chancellor, he presided in the court of chancery. Lord Eldon said that he remembered the case:

And very angry I was with the decision; but I [have] lived long enough to find out that one may be very angry and very wrong.[9]

Words of pearly wisdom.

But Lord Eldon lived centuries ago. A more recent instance of an advocate controlling temper in court was provided by Judge Ruth Ginsburg – the woman judge on the US Supreme Court. She was interviewed for the *Judges Journal* (Summer 2009) – an American publication – and this is what she recalled:

> Once when I was arguing a gender discrimination case before a 3-judge panel, one Judge commented, 'But Mrs Ginsburg – women have equal opportunities now even in the military.'
>
> I responded: 'Not entirely your Honour. The Air Force doesn't provide flight training for women.' The Judge then remarked: 'On my dear, don't tell me women aren't in flight.
>
> The women in my life have been in the air for years.' (Laughter in court)
>
> But how did you respond to this? asked Ruth Ginsburg's interviewer.
>
> And the reply was, 'My mother's advice (never to lose my temper) served me well. Instead of calling him a sexist I said: "Indeed your Honour. And many of the men I know don't have their feet planted on the ground."'

I have lived long enough to confess that contrary to 'mother's advice', on occasions I have exhibited anger in court, and when I have, I have been in error! The minority educational institution cases in which I had appeared as lead counsel (I had appeared in all of them) have spawned a spate of decisions of the Supreme Court of India – of benches of five, seven, and then eleven judges![10] I recall an occasion when arguing before a bench of seven judges on behalf of minority educational institutions (which framed questions and referred the same to a bench of 11 judges), Justice A. S. Anand who was sitting on the bench presided over by Justice M. M. Punchhi made the following point (in the course of my argument):

> Mr Nariman, was it ever contemplated by the framers of our Constitution that postgraduate education and specialty education should also fall within the provisions of Article 30?[11]

Obviously, he thought not. So when Justice Anand posed this question I was angry. I said that under Article 30 of the Constitution (in the Fundamental Rights Chapter) all minorities whether based on religion or language had the right to establish and administer educational institutions of their choice – and that ever since the 1974 decision in the *St. Xavier's College* case[12] in which a bench of nine judges had pronounced its verdict, even secular education in schools and colleges was regarded as covered by the provisions of Article 30. Then, how could it have been ever contemplated by the framers of the Constitution that postgraduate education would fall outside the provisions of Article 30, I asked rhetorically (with considerable heat).

But I now realize I was wrong. On mature reflection, I believe that all the complexity of our present problems concerning minority educational institutions could have been avoided if we (on behalf of the petitioners – minority educational institutions) had argued, and the court in its final decision had simply said (as Justice Anand had then tentatively suggested) that the provisions of Article 30 were meant to give minority educational institutions preference only upto the college level; but not beyond. To say that Article 30 also governed postgraduate and specialized studies, as was later expressly held by Justice B. N. Kirpal, who presided over the bench of 11 judges in November 2002,[13] was (I now realize) an unmitigated disaster – for minorities. By insisting on Article 30, reaching out and encompassing postgraduate and speciality studies in medicine, engineering and the like, I believe it is the minorities that have lost out. And the true content and intent of Article 30 has got devalued only because we (on behalf of the minority educational institutions) tried to reach out to what was plainly beyond the scope and intent of the Article.

(16) Don't quarrel with your opponents or be nasty to them because if you have chosen the law as your profession, the major part of your life will be spent with colleagues at the Bar. You must rub shoulders with them, and a sense of camaraderie at the Bar is essential for preservation of your continued sanity. Your compatriots will always speak well about you if you have not been mean or uncharitable to them – in word or in action. Remember: Dog don't eat Dog.[14] Again, this piece of advice is

borne out of personal experience. Some years ago during the hearing of an appeal in the Supreme Court of India – at a time when I was not keeping too well and was apt to be irritable in court – I harshly interrupted a competent and able advocate, former additional solicitor general (ASG) of India, Kirit Raval. I was definitely nasty to him. He did not say a word, but the judge (Justice R. C. Lahoti – not yet CJI) came to his rescue. He said, 'I think Mr Nariman it is time that you should retire.' I was stung to the quick! But the judge was absolutely right. No matter what your age and standing at the Bar, it will just not do to be rude to your opponent. I owe Justice Lahoti my thanks, because the best advice that one can give with sincerity is the lesson that one has learnt oneself – in the 'school of hard knocks'!

(17) Always address a court correctly. Each judge must be addressed according to the manner in which his station entitles him. For instance, an administrative officer who presides at a departmental hearing must be addressed as 'Sir', a magistrate as 'Your Worship' (in Bombay and Calcutta) and elsewhere as 'Your Honour'. Similarly, a city court judge and a district judge must be addressed as 'Your Honour', and (most important of all) a high court judge must always be addressed as 'Your Lordship' (believe me, the judges simply love it). Years ago, I appeared before a judge who had just been 'elevated' from the city civil court to the high court, and was particular about how he should hence forth be addressed. My opponent who had appeared before him in the adjoining building, the city civil and sessions court, imagined he was still addressing a city court judge and went on calling him 'Your Honour'. The judge grimaced at this indignity. My opponent had a good case. But he lost! Judges are human. An aside: the phrase, 'the judges simply love it', is borrowed from a comment by Lord Geoffrey Lane. When Lord Lane, lord chief justice of England and Wales, came to India to address a conference of the International Bar Association (in the year 1982), he and I shared a platform. Whilst we were sitting together waiting to deliver our speeches, he leaned forward and said to me, 'Mr Nariman I have been troubled for sometime now and I want

to ask you whether you would agree with me that in your Constitution you made a great mistake by abolishing titles.' He was referring to Article 18: ['Abolition of titles (1) No title, not being a military or academic distinction, shall be conferred by the State.']. I told Lord Lane, 'I would agree with you Chief Justice, but why do you say so?' And he sweetly said with a twinkle in his eyes, '*Oh, titles are wonderful. The ladies simply love it!*'

(18) Yes, judges are human, and some judges are more easily peeved than others! David Pannick QC in his book, *Judges*,[15] cites the farcical case of Sardar Tejendrasingh who persistently refused to stand up while addressing the Cambridge County Court in support of his claims for money owed to him. The reason he gave was that he had 'no respect for this country or its civilization or its Courts'. The registrar of the court ordered the action to be stayed until Tejendrasingh purged his contempt of court – the court's position being that the action would not be heard until Tejendrasingh gave an undertaking in writing that he would stand up when addressing the court. Tajendrasingh appealed. Three judges of the court of appeal, including Sir John Donaldson, the master of the rolls, allowed Tajendrasingh to address them sitting down 'so as to avoid' (as they felicitously put it) 'prejudging the fundamental issues raised by this case'. But they decided in the end that the county court judge was entitled to stand on his dignity and to require Tajendrasingh to stand up when addressing them! David Pannick comments on this case. He writes that 'the enforcement of respect for the judiciary by not listening to those who will not stand up has little to recommend it. … Many tribunals dispense justice sitting down. The *Tejendrasingh* case was an instance which encourages judges to think that their dignity was more important than getting on with the job of deciding cases.' Quite right! But whatever David Pannick QC may say, my advice to young lawyers is don't ever emulate Sardar Tejendrasingh or encourage your client to do so!

(19) Never consciously make an incorrect statement in court – or you run the risk of being 'mentally blackballed' by the judge – a

warning mentioned (extrajudicially) many years ago by Justice S. R. Tendolkar of the Bombay High Court. He had a sharp mind but he had a caustic tongue as well. Being mentally blackballed by the judge is the practising lawyer's greatest occupational hazard. If you deliberately make incorrect statements – and make a habit of it – your assertions will be looked upon like the chimes of the proverbial Irish clock that strikes 13. People who have to listen to you will not only disbelieve the thirteenth chime, but will have great doubts about the correctness of the first 12!

(20) Don't criticize the judge before whom you have appeared either in the corridors of the court or in the Bar library or before clients. When you are in a calm or collected mood, reflect on what transpired in court, and ask yourself whether the judge may not have been right? Otherwise consult a senior lawyer (who is not opinionated) and follow his advice. If you must say something about the conduct of a judge, do so in the court of appeal. If not, remain silent, i.e., if you want to get on in the profession.

(21) The renowned philosopher (and judge), Francis Bacon, had said in the seventeenth century, 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.'[16] A much-speaking lawyer is worse. He is like a cracked drum – unpleasant to listen to by the judge whose painful duty it is to hear him!

(22) Learn to lose with dignity. Please remember only one side in the case can win. The other side must lose. You must also be conscious of the fact that in an adversarial system, the judge is often compelled to disclose his mind at an early stage of the hearing. After all, he has to decide in the end in favour of one of the parties and against the other. And don't jump to conclusions about the judge who speaks his mind whilst you are arguing. Many judges will say something in court against your contention. Don't assume the judge is against you without having fully heard you. He often poses questions (seemingly against your client's case) only in order to get the best out of you, not because he has

been taken in by the case of the other side! The entire edifice of the legal system exists – and can survive – only on the basis of mutual good faith between the bench and the Bar.

(23) Never give interviews or talk to the media in cases where *you* have appeared. It smacks of cheap publicity and is unfair to the judge who cannot retaliate, and it is unfair to your opponent who may not be given the opportunity to refute what you say. If the judgment in the case in which you have appeared needs to be criticized, such criticism will be better appreciated when it emanates from disinterested quarters. H. M. Seervai reserved 14 closely printed pages of the third edition of his book (*Constitutional Law of India*, Vol. I, pp. 651–665) to a sharp and biting criticism of the judgment of the Constitution Bench in the *Escorts* case,[17] a case which I argued and won in the High Court, but argued and lost in the Supreme Court! Nothing pleased me more than those 14 printed pages of critique in which Seervai roundly chastised dear old Justice Chinnappa Reddy who delivered the court's judgment in the case. When Hari Nanda of Escorts was writing his life's story, I sought and obtained (at Hari's request) Seervai's permission to reproduce these pages, in his autobiography! Old Hari, bless his soul, was tickled pink when I sent him copies of those 14 pages – 'a Daniel come to judgment,' he said to me, and added, 'Fali, we have been vindicated.' Clients who lose even in the last court will always maintain they were right!

(24) Never complain about the inadequacy of the time set by the judge for your argument. You thereby expose your own incompetence of not being able to 'put your case in capsule form', as the late Justice R. S. Bachawat of the Supreme Court used to advise us to do. Believe me, there is nothing like the constraints of time to sharpen the intellect. When time is put against you, you will only have to say what is strictly relevant. I have watched in federal courts in the United States where attorneys are given ten, at most fifteen, minutes to complete an argument in a regular appeal. Federal judges there have told me that after reading the papers

and forming a particular view, they have often changed it after hearing the crisp but effective arguments of attorneys at the time of oral hearing. When time for argument is preset (and it should be in all appellate courts), don't complain when the judges enforce it because that is the discipline of the law.

Some years ago on behalf of the Bar Association of India, I had invited the legendary Professor Archibald Cox (a highly respected US attorney and special prosecutor during the US Watergate trial) to deliver a series of lectures in Delhi, Bombay and Madras.[18] Cox told us his experience of the rigid time limits imposed by the Supreme Court of the United States. He was arguing the landmark case on reverse discrimination[19] (*Regents of University of California vs Bakke*),[20] and was allotted 30 minutes for oral argument – the maximum time the US Supreme Court permits. The judges were closely questioning him and he was fielding their questions and responding to them. Suddenly, the ominous bright light (in front of the chief justice) came on, but at this point Cox was making an eloquent plea and he continued. Chief Justice Warren Burger pulled him up, 'Mr Cox the light is on.' Cox went on for a full 30 seconds more. The chief justice, in a louder, more peremptory tone, declared, 'Mr Cox the light is on.' And Cox had to stop mid-sentence! Some years ago I read an article written by an American lawyer advising his younger colleagues at the Bar on how to argue cases in the appellate courts. There were about 20 'tips' and the last was peremptory: 'sit down'. This is perhaps the wisest piece of advice to all practising lawyers. They must know when to stop!

(25) The skill of a practising lawyer in this modern age is not flamboyance or verbosity. In India, trial by jury has been abolished ever since the trial of Commander K. M. Nanavati. He was a bright but impetuous officer in the Indian Navy, and he shot dead – in a fit of rage – his wife's lover, Prem Ahuja, in April 1959. In view of an impassioned and eloquent plea by his counsel, Karl Khandalavala – one of the leading criminal lawyers of the time – the jury (despite the summing up by the trial judge) brought in a verdict of not guilty of murder (8:1). Since the sessions judge did not agree with the verdict of the jury, he

referred the case to the Bombay High Court for reappraisal (as he was empowered to do by law). The reference was effectively argued for the government in the high court by the then government pleader, Y. V. Chandrachud (later judge in the Bombay High Court and then in the Supreme Court, and ultimately chief justice of India). The evidence led in the case was reconsidered by two judges of the Bombay High Court, and they reached the unanimous conclusion that Commander Nanavati was guilty of cold-blooded murder, and sentenced him to life imprisonment. The verdict of the jury, they said, was a travesty of justice. As a consequence, the jury system – then prevalent in criminal trials – was abolished. It is no longer *forensic eloquence* but hard work and *forensic skill* that is now required of a practising lawyer – both on the criminal and the civil side. When arguing a case – civil or criminal – avoid histrionics and stick to the record; you will find the judge receptive to your pleas.

(26) It is an illusion to think that great cases are won or lost because of their inherent strength or weakness. In any case it is not universally true. Advocacy plays a vital role, simply because the judge is also human, like the advocate – the only difference is that he or she is trained to control emotions better. Kanhaiya Lal Misra was one of the most powerful advocates of his time and one of the most persuasive. Knowledgeable people in Allahabad will tell you about US Supreme Court Chief Justice Earl Warren's tribute: 'I as a Judge of the Supreme Court of America should not be emotional, but I must confess that though I have travelled all over the globe but never was I moved more emotionally than by the speech of the learned Advocate General of Uttar Pradesh Mr K. L. Misra today.' This was a great tribute to a great advocate by a great judge. I had the privilege of listening to him, arguing – a criminal appeal – in the Bombay High Court when he was there for about a month in the 1960s. He treated the court with utmost courtesy, a treatment which was reciprocated by the bench. He did not succeed in the case and the judges kept questioning him; questions which he coolly answered. He knew – like all great advocates know – that to lose your temper at a judge is losing half

the battle in court. If you have a temper and get upset at what the judge sometimes says, control your temper and if you cannot control it then find some excuse to berate your junior sitting next to you, and the judge will think you are unnecessarily losing your temper on a young man who is trying to assist you! Kanhaiya Lal knew the 'tricks of the trade' – and believe me, the expression 'tricks of the trade' is not a disparaging remark. It is a mark of appreciation for a person steeped in the fine art of advocacy, which after all is the art of gently persuading the judge to your point of view.

(27) Sir Jamshedji Kanga was of the opinion that in his generation, Sir Chimanlal Setalvad (father of Motilal Setalvad) was the finest lawyer and that Bhulabhai Desai (years younger to Kanga)[21] was the best advocate. Asoke K. Sen, another great advocate of his time (and a good friend – he had the admirable quality of never speaking ill of anyone, not even against his opponent), had a story to tell about Bhulabhai Desai – as to how important it is for an advocate to have an outstanding memory. It was narrated to him by B. P. Khaitan, one of the senior solicitors in Calcutta in the late 1940s. Khaitan's client had briefed Bhulabhai Desai in a very heavy testamentary suit (concerning a will) to come up in the Bombay High Court. The client trusted his solicitor implicitly and took Khaitan with him from Calcutta to Bombay to wait on Bhulabhai Desai, and to hold conferences with him. They all went a full month before the suit was to be placed on board for hearing. But Bhulabhai was too busy from day to day in other matters, and he could not afford to give Khaitan and his client more than about half an hour, each evening. Even at these conferences, he had to be constantly reminded of the facts, and made to read and reread the case papers. At the end of three weeks, B. P. Khaitan was so exasperated that he told his client, 'My dear fellow, the case is tomorrow! We have done all we can, but fate is against you. Your Counsel has not read your brief and all you can do is to go to the Mahalaxmi Temple and pray that some miracle happens.' The miracle did happen. Next day when the case reached hearing, Bhulabhai stood up and without a note and without referring to

any part of the 2,000-page brief lying before him, gave the judge a masterly summary of the facts and then proceeded to deal with the law. Khaitan (an experienced solicitor) told A. K. Sen that it was a consummate performance – one that he had never witnessed before. Not everyone can emulate Bhulabhai – but you must try.

(28) Good sight and good hearing are essential attributes for a lawyer in active practice. I remember Sir Jamshedji telling us that old John Duncan Inverarity (1870–1923) – the doyen of the Bombay Bar – when hard of hearing, was granted the indulgence of a place near the judge, so that he could hear better all that was said in Court. In an action – before the admiralty judge – the captain of the ship was giving oral evidence and said, '… and the ship was slowly sinking …' Inverarity, despite his proximity to the witness and the judge, misheard the statement; he immediately stood up and in a loud voice demanded to know 'who was drinking?' On being told by his junior (in a loud whisper) what the captain had actually said, Inverarity sheepishly resumed his seat. Sir Jamshedji told us that there was a moral to this story – it was that when you are old and infirm, you must stop practising! Good advice. And Sir Jamshedji practised what he preached; he stopped arguing in court from the late 1950s (or early 1960s) but never missed a day coming to the chambers.

Notes and References

1. Quoted in *Oxford Dictionary of American Legal Quotations* (1993), Fred R. Shapiro (ed.), Oxford University Press, p. 11.

2. Decisions of the Privy Council are called 'opinions' because they are in the form of advice to the English Monarch. Decisions of courts, whether in England or in India are called 'judgments'. Decisions of the House of Lords (judicial) are in the form of 'speeches' by the law lords.

3. England's lord chancellor from June 1970 to March 1974, and again under Prime Minister Margaret Thatcher from May 1979 to June 1987.

4. *A Sparrow's Flight – A Memoir* (1990), Collins, London, pp. 86–87.

5. Which means you cannot call yourself 'doctor'!

6. More of this great judge later.

7. Attributed to C. Northcote Parkinson, the father of Parkinson's Law.

8. Letter to the General Assembly of the Church of Scotland dated 3 August 1650; quotation reproduced in the *Oxford Dictionary of Quotation* (1975), Second Edition, Oxford University Press, London.

9. The incident is related in *A Second Miscellany-at-Law* (1973), R. E. Megarry, Stevens and Son Ltd, p. 3.

10. The cases had a chequered history. They were first placed before a bench of five judges (1993) which was prima facie of the opinion that Article 30 did not clothe a minority educational institution with the power to adopt its own method of selection of students; the court also doubted the correctness of an earlier decision of five judges in the *St. Stephens College* case (1992); the court then directed that the cases be referred to and decided by a larger bench. The cases were then placed before a bench of seven judges. The questions framed, as to the scope of Article 30, were recast and on 6 February 1997 the bench (of seven judges) directed that the matter be placed before a bench of at least 11 judges, since it was felt that (in view of the 42nd Constitutional Amendment, 1976, which included 'education' in the Concurrent List Entry 25 of List III of the Seventh Schedule to the Constitution) the question of who should be regarded as a 'minority' needed fresh consideration, because the earlier case-

law was of the pre-amendment era, when the legislative topic 'education' was in the State List: the final judgment dated 31 October 2002 / 15 November 2002 is reported in 2002 (8) SCC 481 (11J).

After the delivery of the judgment of 11 judges in *T. M. Pai Foundation*, the Union of India and various states interpreted the majority judgment differently. Different statutes/regulations were framed by different state governments. This led to further litigation in several courts. Ultimately matters came up before a five-judge bench (*Islamic Academy vs State of Karnataka* – 2003 6 SCC 697) to explain the majority decision (of 11 judges) and to clarify any doubts/anomalies. The decision however only created further confusion, and in 2005 the decision of the 11-judge bench (2002 8 SCC 481) was referred again to a seven-judge bench for explanation. The task before this seven-judge bench (2005 6 SCC 537) was to cull out the ratio of *T. M. Pai Foundation* (11 judges) and to examine if the explanation or clarification given by the five-judge bench in Islamic Academy (2003) ran counter to *T. M. Pai Foundation* (11-judge bench) and if so, to what extent (*P. A. Inamdar vs State of Maharashtra* – 2005 6 SCC 537).

The decision of the seven-judge bench (2005 (6) SCC 537) explaining the decision of the 11-judge bench (2002 (8) SCC 481) was to the effect that for minority unaided educational institutions asking for affiliation or recognition there cannot be an interference in the day to day administration, and the essential ingredients of management including admission of students, recruiting of staff and quantum of fee to be charged cannot be regulated – but the right to administer would not include the right to maladminister, and any regulation accompanying affiliation or regulation must satisfy the test of reasonableness and rationality, be conducive to making the institution an effective vehicle of education for the minor community or other persons who resort to it and there must be no inroad into the protection conferred by Article 30(1) of the Constitution by framing regulations whereby the essential character of the minority educational institution is taken away. Besides, the state cannot insist on private educational institutions which receive no aid from the state to implement the

state's policy on reservation for granting admission on lesser percentage of marks, i.e., on any criterion except merit, thus imposition of quota of state seats or enforcing any reservation policy of the state on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of minority educational institutions.

11. Article 30 (1) of our Constitution reads as follows:

All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

12. 1974 (1) SCC 717

13. 2002 (8) SCC 481

14. 'Dog eat dog' is generally used to describe situations (e.g., in business) where ruthless methods are used. See *Oxford Advanced Learner's Dictionary of Current English* (Eighteenth Issue, Revised 1985), p. 256.

15. *Judges* (1987), David Pannick, Oxford University Press, New York, pp. 133–137. The companion work, also by David Pannick, is titled *Advocates* (1993), Oxford University Press, New York.

16. *Essays: Of Judicature; I Works of Francis Bacon* (1852), Philadelphia: A. Hart, p. 58. The phrase: 'an over-speaking judge is no well-tuned cymbal' was quoted and adopted by Lord Justice Denning in *Jones vs National Coal Board* (1957) 2 All E.R. 155, p. 159 (C.A.).

The court of appeal had to deal with a ground of appeal taken before the trial court about frequent interruptions during the hearing of the evidence called on behalf of the defendants; in particular, it was virtually impossible for counsel for the plaintiff to put the plaintiff's case properly or adequately or to cross-examine the witnesses called on behalf of the defendants

adequately or effectively. Denning (then lord justice) set out (in his judgment) the standards of propriety expected of a trial judge hearing evidence, and after adopting Lord Bacon's quote he said, 'Such are our standards. They are set so high that we cannot hope to attain them all the time. In the very pursuit of justice, our keenness may out-run our sureness, and we may trip and fall. That is what has happened here. A judge of acute perception, acknowledged learning, and actuated by the best of motives, has nevertheless himself intervened so much in the conduct of the case that one of the parties – nay, each of them – has come away complaining that he was not able to properly put his case; and these complaints are, we think, justified.'

17. *LIC vs Escorts* (AIR 1986 S.C. 1370) was a corporate battle. It raised important questions of interpretation of the Foreign Exchange Regulation Act (FERA), the powers of the Reserve Bank of India (RBI) and of the Government of India in relation to FERA. It also raised important questions of Company Law because the LIC, the Unit Trust of India (UTI), the Industrial Development Bank of India (IDBI) held 52 per cent of the shares in Escorts. LIC, which held 30 per cent of the shares of Escorts, requisitioned an extraordinary general meeting for the removal of the existing non-executive part-time directors. The validity of this requisition was challenged by Escorts on the ground that it violated the provisions of the Companies Act and also on the ground that the requisition was mala fide and arbitrary.

18. I came to know him since he was my son Rohinton's tutor at Harvard Law School, Cambridge, USA.

19. A term used to refer to the exclusion of a member of a majority class not commonly discriminated against, to compensate for the traditional discrimination against a minority member.

20. 438 US 265 (1978)

21. According to P. B. Vaccha in *Famous Judges, Lawyers and Cases of Bombay*, pp. 154–155, 'Bhulabhai Desai has for some years

among Indian lawyers the largest and most lucrative practice at the Bombay Bar … Desai was a member of the quartette consisting of Chimanlal Setalvad, Kanga and Taraporwala besides himself. In a few years, he and Kanga practically monopolised the work on the Original Side … He was elected to the Imperial Legislative Council where he became the leader of the Opposition. He also defended with great ability and eloquence the accused military officers in the famous I. N. A. trial, towards the end of the Second World War. But his services to the nationalist cause were not adequately appreciated; and he died prematurely in 1946, a rather disappointed and broken-hearted man, without achieving his political ambitions. However, his legal career stands unique and almost unparalleled in the legal history of India.'

Jamshedji was very fond of Bhulabhai Desai – affectionately calling him 'Bhula'. He told us that when he (Jamshedji) went to visit Bhula in his last illness, he was very bitter against the government of the day (Pandit Nehru in particular).

Chapter 6

Turning Points in My Life – and in the Life of the Nation

The power to declare the law, said a great American judge, carries with it the power and, within limits, the duty to make law where none exists.

*M*eanwhile, I must go back a little to another important turning point in my life. In October 1955, I was married to Bapsi Contractor. When I invited Sir Jamshedji to the wedding, he asked me who I was getting married to and I told him. He knew Bapsi's family, and gave me the entire history of the Contractors. He then mentioned that Bapsi's paternal grandfather had constructed Jamshedji Tata's Taj Mahal Hotel in Bombay (in 1903), and he had also built the Gateway of India. During the period when he (Kanga) was advocate general of Bombay for 13 years, he had heard the then viceroy of India (Lord Reading) declare open the Gateway of India (in 1924) and make laudatory remarks about Khan Sahib Sorabji Contractor.

The Narimans with the Contractors

At this point of time, I can frankly tell you I am a long-married man – not to be confused with a much-married man! Bapsi and I celebrated our golden wedding anniversary in October 2005; she has always been a most loyal and loving consort. She has supported me through thick and thin, and if I have made something of my life it is entirely due to her; she has a rare intuition about people and about things that matter. Of course, we have had

our difficulties and differences over the years, as to which I always recall what C. K. Daphtary (CK) had said when he and Cicily celebrated their golden wedding anniversary, at which a few friends and admirers were invited. After the evening had become convivial, we all called for a speech. Daphtary, with a characteristic twinkle in his eye, said, 'It will be a short speech. You all know that Cicily has been my wife for fifty long years. She has been a good wife but in a married life of this length I must frankly confess that the first 49 years have been the most difficult.'

But seriously, of all the important things that have happened to me in a long married life, Bapsi has been responsible for them or has effectively contributed to them – like bringing up our children when they were young, looking for a house in Delhi after I resigned the post of additional solicitor general (ASG) in protest against the Internal Emergency, exerting every nerve to see that we bought the house we now happily live in (I was against buying it!), pressing me to accept nomination to the Upper House about which I was reluctant, encouraging me when I had been depressed; in fact, she has been my life-support in good times and bad. An excellent chef herself, she has written and published eight books on various types of cuisines. Apart from caring for her family and being skilled in running a busy household, Bapsi has to her credit a record of excellent social work, including setting up and conducting a clinic for the poor and needy in and around Zamrudpur, and helping to provide children of residents there with meaningful education.

Bapsi and Fali Nariman at a function

An important turning point in my professional life was during my years at the Bar in Bombay (and before I moved to Delhi): I was briefed by my very good friend, Attorney Dharmsingh Popat (senior partner of M/s Mulla & Mulla, Solicitors), in a cause célèbre in the Supreme Court. It was the famed *Golaknath* case (1967)[1] – *Golaknath vs State of Punjab*: 'famed' because a bench of 11 judges was constituted to hear this case. Under the Constitution of India, 1950, courts are empowered to invalidate legislative enactments and executive orders if they violate any part of the fundamental rights guaranteed in Part III. Part III is our Bill of Rights. But are courts empowered to adjudicate upon the validity of constitutional amendments? On this great question, our Constitution is silent. The Supreme Court grappled for several years with the problems that this question had posed – first in *Shankari Prasad* (1951), again in *Sajjan Singh* (1965) and *Golaknath* (1967), and finally, once again, in *Kesavananda* (1973).

In *Shankari Prasad* (AIR 1951 SC 458), the Constitution First Amendment Act, 1951, which had inserted Article 31B, was challenged (before a Constitution Bench of five judges) as ultra vires and unconstitutional. It said that none of the acts and regulations specified in the Ninth Schedule, nor any provision thereof, would be deemed to be void or ever to have become void on the ground that such act, regulation or provision was inconsistent with or took away or abridged any of the rights conferred in the Fundamental Rights Chapter. It went on to provide that notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said acts and regulations specified in the Ninth Schedule (subject to the power of any competent legislature to repeal or amend it) would continue in force. What prompted this enactment was that the Congress Party, which commanded an overwhelming majority of votes in several state legislatures as well as in Parliament, had initiated certain measures of agrarian reform by enacting legislation such as abolition of zamindaris. The High Court of Patna held that the act passed in Bihar was unconstitutional, whilst High Courts of Allahabad and Nagpur had upheld the validity of corresponding legislation in Uttar Pradesh and Madhya Pradesh. Appeals from those decisions were pending in the Supreme Court. At this stage, the Government of India, with a view to put an end to all this litigation, brought forward a bill to amend the Constitution which was passed by the requisite two-thirds majority – this was the Constitution First

Amendment Act, 1951 (Article 31B). Swiftly reacting to this move, the zamindars filed petitions under Article 32 of the Constitution in the Supreme Court challenging the amendment itself as unconstitutional.

A unanimous court (Patanjali Sastri J. speaking for the court) rejected the petitions of the zamindars – the court held that to make a law which contravenes the Constitution constitutionally valid is a matter of constitutional amendment and as such falls within the exclusive power of Parliament.

Fourteen years later, Shankari Prasad's case (1951) was revisited in *Sajjan Singh* (AIR 1965 SC 845). The Constitution Seventeenth Amendment Act, 1964, had placed a still larger number of state enactments in the Ninth Schedule to obviate a challenge against them as being in violation of fundamental rights. The seventeenth amendment to the Constitution was upheld by a bench of five judges – but not without some reservations by two of the justices on the bench (Justice Hidayatullah and Justice Mudholkar). One of them (Justice Hidayatullah) said that he would require stronger reasons than those given in *Shankari Prasad* (1951) to make him accept the view that fundamental rights were not really fundamental but were intended to be within the power of amendment in common with other parts of the Constitution. And the other judge (Justice Mudholkar) mentioned the considerations which made him feel reluctant to accept as a definite opinion the proposition that the word 'law' in Article 13(2) of the Constitution excluded a constitutional amendment. Justice Mudholkar ended his judgment with the following words:

> 66. Before I part with this case I wish to make it clear that what I have said in this judgment is not an expression of my final opinion but only an expression of certain doubts which have assailed me regarding a question of paramount importance to the citizens of our country: to know whether the basic features of the Constitution under which we live and to which we owe allegiance are to endure for all time – or at least for the foreseeable future – or whether they are no more enduring than the implemental and subordinate provisions of the Constitution. (pp. 865–866)

It was ultimately in *Golaknath* (1967) where a specially constituted bench of all the permanent judges on the Supreme Court (a bench of 11

judges) considered whether any part of the fundamental rights guaranteed in the constitution could be abrogated or amended by constitutional amendment, i.e., by an amendment passed with the requisite two-thirds majority in Parliament.

I had the privilege of appearing as a junior counsel in 1967 for a group of petitioners in *Golaknath* – assisting both senior counsel A. K. Sen and N. A. Palkhivala. The ruling party had more than a two-thirds majority in each of the two Houses of Parliament. And yet, Chief Justice Subba Rao who presided over the bench in *Golaknath* managed to forge (with his qualities of judicial statesmanship) a narrow majority (6:5) for the view that none of the fundamental rights were amenable to the amending power (Article 368) in the Constitution, simply because an amendment to the Constitution was a 'law' under Article 13(2) and under that Article all laws in contravention of any of the fundamental rights in Part III of the Constitution were expressly declared to be void. The battle then was over property rights (Article 19(1)(f) and Article 31), and many members of Parliament were disturbed by the pronouncement, viz. that fundamental rights including the fundamental right to property could not be amended even by a constitutional amendment passed with the requisite two-thirds majority. In defiance, Parliament went ahead with more constitutional amendments.

Six years later in 1973, a still larger bench of 13 judges of the Supreme Court was constituted, presided over by Chief Justice S. M. Sikri to consider the validity of some of these later amendments (the twenty-fourth, twenty-fifth and twenty-ninth amendments) – but more basically to consider the correctness of the decision in *Golaknath*. The case goes by the name of *Kesavananda Bharati* or the *Fundamental Rights* case. At the time when *Kesavananda* was heard, I was already additional solicitor general of India, and since I had appeared as counsel for the petitioners in *Golaknath*, I could not (and did not) appear for the government in *Kesavananda*. In *Kesavananda*, the court held (by a narrowly fractured majority of 7:6) that although no part of the Constitution, including fundamental rights, was beyond the amending power (*Golaknath* was overruled), one thing was certain viz. that the basic features of the Constitution – mentioned in the last paragraph of the judgment of Justice Mudholkar in *Sajjan Singh* (1965) – could never be abrogated, even by a constitutional amendment.

A personal aside: before *Golaknath*, I had never known anyone – no one; neither judge or lawyer – ever poking fun at Nani Palkhivala's arguments.

This was dared by a great lawyer from eastern India, the same Kanhaiya Lal Misra. In *Golaknath*, he did so quite defiantly. He was appearing on the opposite side – as advocate general for his state (Uttar Pradesh). In his opening argument, Palkhivala had advocated the theory of implied limitations (which was to find favour only later in *Kesavananda*). Palkhivala relied upon the relevant part of Article 368 (2) which said that a bill to amend the Constitution 'shall be presented to the President who shall give his assent to the Bill, and thereupon the Constitution shall stand amended in accordance with the terms of the Bill.' This must mean, Palkhivala argued, that at the end of the procedure for amendment, the Constitution must stand, i.e., it must remain. Therefore, a wholesale amendment repealing the provisions of the Constitution was unthinkable; hence, implied limitations had to be read into Article 368 itself. Palkhivala emphasized the words 'shall stand amended' in Article 368 (2) not once but several times – in words and in gestures. As was customary with him, when he was agitated he used both his hands to emphasize the point!

When Kanhaiya Lal Misra got up to reply, he submitted that there were no implied limitations to the amending power. Misra made his submissions in low-key. He was not agitated. And after he stated his point, he poked fun at Palkhivala's emphasis on the words 'shall stand amended'. 'What should it have said, My Lords?' he asked, in mock surprise. 'Should the Clause have said that the Constitution shall sit amended?'

He then went on, 'No-no – My Lords. Plain English cannot be subverted to suit any particular point of view.'

Kanhaiya Lal's English was impeccable. One could perhaps outsmart him occasionally on law but never on the English language. Sidharth Shanker Ray has written a moving tribute to Kanhaiya Lal Misra which one can find in the *125th Post Centenary Silver Jubilee Volume* of the Allahabad High Court (1866–1991). He tells us (what I did not know till I read this piece) that Kanhaiya Lal scored 150 out of 150 marks in his English essay paper in the Indian Civil Service Examination of 1926! He passed. And yet he was not selected for the ICS; others who scored less marks were preferred. This was so irregular that questions were asked about it in the British Parliament. It appears that in the year 1926, Kanhaiya Lal had committed the unpardonable sin of joining the nationalist movement, and there was a black mark against his name. And his obtaining cent per cent marks in his English essay paper had a sequel. It was Sir Arthur Quiller-

Couch – the well-known professor and master of the English language, and one of the editors of the *Oxford Book of Verse* – who had examined and marked Kanhaiya Lal's paper. He was so impressed that he not only gave him full marks but also took the trouble of writing a personal letter to Kanihya Lal's professor in Allahabad University. In his letter to Professor Dunn, he summarized K. L. Misra's brilliance with a bit of hyperbole:

> It is the Englishman who had conquered India, but it is only K. L. Misra who conquered English!

That Quiller-Couch should have had the enthusiasm to write to someone in India is reminiscent of the story related by me earlier of Alfred Lord Tennyson (the poet laureate of England) writing to a then-unknown young graduate in Bombay, Dinshaw Mulla!

* * *

The opinions in *Golaknath* (1967) and then in *Kesavananda* (1973) were products of divided courts. They aroused much controversy and contention but the basic structure theory has come to stay; it was evolved from the great silences in our Constitution. After all, although the Constitution did provide that it could be amended, it surely did not say that it could be abrogated, or that its basic features could be thrown to the winds!

Though an innovative doctrine in disputes relating to property rights, the basic structure doctrine has long survived the deletion of the right to property from the Fundamental Rights Chapter.[2]

Durga Das Basu was critical of the judgment in *Kesavananda*. In his commentary, he wrote:

> The Court took upon itself the task of differentiating between the essential and non-essential features of the Constitution. No such power was vested in the Court by Article 368 either expressly or by implication.

Dr Basu's view was that of the strict legal constructionist, but the Supreme Court was not bound by a literal view of the Constitution. Great cases are often shaped by events; as Justice Cardozo famously said, 'The

hydraulic pressure of great events do not pass judges idly by.' Though of doubtful legal validity, the basic structure theory was the reaction of a court that was apprehensive of an over-enthusiastic, overpowering one-party majority in Parliament. But the doctrine – even though illogical – has come to stay, and it was firmly cemented in 1975 because of an over-enthusiastic response of the government of the day to a verdict of the Allahabad High Court.

Prime Minister Indira Gandhi lost the election petition filed against her in June 1975 in the Allahabad High Court; her advisers (too ready to please) recommended not only an appeal to the Supreme Court but also a drastic constitutional amendment. Whilst Indira Gandhi's appeal was pending in the Supreme Court, a bill amending the Constitution was rushed through Parliament. The Constitution Thirty-ninth Amendment Act, 1975, provided, among other things, that disputes regarding the election of a person who becomes prime minister was not to be decided in courts but by a special body named by Parliament.[3] It also provided that election laws would not be applicable to the prime minister and would not be deemed over to have been applicable to the prime minister; notwithstanding any order of any court, the election of the prime minister would never be deemed to have become invalid or void – the election of the prime minister would continue to be valid in all respects.

Strange as it may sound, it is this monstrous amendment that helped to save the basic structure theory from death and destruction. The thirty-ninth amendment of the Constitution was a crude attempt to pre-empt the Supreme Court from deciding the election appeal of Indira Gandhi. But fortunately for the country, the court successfully resisted the attempt – relying for the first time after the *Fundamental Rights* case on the basic structure theory. In *Indira Gandhi vs Raj Narain* (1975),[4] the court established that 'judicial review' and 'free and fair elections' were a fundamental part of the Constitution beyond the reach of the amending power; the Constitution does not say so, but this was inferred by the Supreme Court from the Constitution's silence. Later, in 1980, the court applied the doctrine of basic structure in a challenge to a provision in the Constitution Forty-second Amendment Act, 1976. This provision shut out all judicial review of constitutional amendments. No amendment to the Constitution (it said) made in accordance with the procedure in Article 368 could be called in question in any court on any ground, whatsoever. But in

Minerva Mills (1980) – AIR 1980 SC 1789 – a Constitution Bench of the court following the ratio in the *Fundamental Rights* case declared that the exclusion of judicial review violated the basic structure of the Constitution and struck down this part of the forty-second amendment.

The power to declare the law, said a great American judge, carries with it the power and, within limits, the duty to make law where none exists. In reading implied limitations in the amending power, the Supreme Court of India had made a new law. As Dr Basu put it in his classic commentary (on the Constitution of India), 'The doctrine of basic features had been invented by the Supreme Court in order to shield the Constitution from frequent and multiple amendments by a majoritarian government.'

Assumption of power by which one organ of government is enabled to control another has been characterized as political power. In asserting the basic structure theory, the Supreme Court of India has, in this sense, asserted political power – in the guise of judicial interpretation. That is why there are so many critics of the basic structure theory. By propounding it, the guardians *of* the Constitution had at one bound become guardians *over* the Constitution. Constitutional adjudicators had assumed the role of Constitutional governors. It must be admitted that the criticism is valid. But equally valid is the stark fact that Parliament in its wisdom has not sought any confrontation. If it had, the casualty would have been the Supreme Court. When the Janata Government endeavoured to recast Article 368 (the Amendment Clause) and introduced provisions for a referendum for effecting changes in the basic features of the Constitution, the attempt failed. The Forty-fifth Amendment Bill could not secure the requisite two-thirds majority in the Rajya Sabha only because the Opposition Party in Parliament (the Congress), which had been the most vociferous advocate of unlimited power of constitutional amendment, simply would not vote for it! Strange are the ways of politics – and of politicians! Parliament has also not chosen to re-enact afresh a constitutional amendment containing an ouster of jurisdiction clause in Article 368 after an earlier attempt at such an enactment (part of the Forty-second Amendment) was struck down by the Court in 1980. As a matter of fact, five years after the basic structure theory was first propounded in the *Fundamental Rights* case, Parliament gave implicit recognition to it – in the Constitution Forty-fourth Amendment Act, 1978. It provided that the fundamental right of life and liberty guaranteed by Article 21 of the Constitution could never be suspended (by law or

constitutional amendment) even during an Emergency – simply because the right to life and liberty were *basic* to the constitutional framework. The basic structure theory has now been woven into our constitutional fabric.

Bapsi and Fali Nariman with Chief Justice Warren Burger of the United States of America while on a visit to Washington

In July 1986 just before his retirement, Chief Justice Warren Burger of the US Supreme Court was interviewed on television by Bill Moyers. In the course on his interview, C. J. Warren Burger said:

> Congress (he was speaking of the US Congress) can review us and change us when we decide a statutory question, and frequently do. But when we decide a constitutional issue, right or wrong, that's it until we change it. Or, the people change it. Don't forget that. The people made it and the people can change it. The people could abolish the Supreme Court entirely.

'How?' asked Bill Moyers.

C. J. Warren Burger's answer was clear and categorical, 'By a Constitutional Amendment.'

He was right. If the people really willed it, they could. But no one in the United States is going to abolish the US Supreme Court, and one can safely predict, with equal confidence, that no one is going to abolish the Supreme Court of India – nor the concept of judicial review. Judicial review will

remain an integral part of Indian Constitutional law and practice, simply because the Supreme Court, relying on popular opinion, has definitively said so. Undoubtedly, primary control on governmental activity in this democracy, as in any other, is with the people. The power which the Supreme Court of India exercises rests ultimately upon their tacit approval. But experience has taught us to take (what James Madison once described as) 'auxiliary precautions'. The basic structure theory was the response of an anxious, activist court to the experience of the working of the Indian Constitution during the first 23 years. It remains today an auxiliary precaution against a possible tidal wave of majoritarian rule – majoritarian rule was the political order of the day for 40 long years (from 1950 right up to the late 1980s).

Notes and References

1. *Golaknath vs State of Punjab*, AIR (All India Reporter) 1967 S.C. 1643

2. Article 19(1)(f) and 31 of the Constitution (the Property Clauses) were deleted from the Fundamental Rights Chapter by the Constitution Forty-fourth Amendment Act, 1978. Article 300A inserted by the Forty-fourth Amendment now provides that no person shall be deprived of his property save by authority of law.

3. That special body under the Disputed Elections (Prime Minister and Speaker) Act, 1977, shall consist a single member, who is a judge of the Supreme Court, to be nominated in this behalf by the chief justice of India. A dispute regarding the election of Morarji Desai (prime minister from March 1977 to July 1979) was under this special law (since repealed) heard by a single judge of the Supreme Court. I was requested by the respondent in the election petition (Prime Minister Desai) to appear for him, which I did. That was the only case decided under this law.

4. AIR 1975 SC 2299

5. 6th Edition, Volume O, pp. 210–211

Chapter 7

Move to Delhi

I enjoyed my work as additional solicitor general and appeared in a large number of cases for the Union of India – in the Supreme Court, and in some of the more important ones in the high courts. I won some, lost some, invariably comforting myself with the motto of the Olympic Games: 'The most important thing in the Olympic Games is not winning but taking part; the essential thing in life is not conquering but fighting well.'

I was married for nearly 17 years when the next turning point in my life occurred. I was appointed as the additional solicitor general of India on 1 May 1972 for a three-year term which required shifting from Bombay. We moved to Delhi and were allotted a very spacious government bungalow at 7, Safdarjung Lane, just behind Prime Minister Indira Gandhi's then official residence. And a new life started. When I moved to Delhi, I had been already practising in Bombay for nearly 22 years because I began my career at the very young age of 21. My leader, Sir Jamshedji Kanga, had told me that he did not start legal practice till he was 28, after he had been ordained as a full-fledged Parsi priest. As a priest, he had developed a phenomenal memory – a quality that our son Rohinton shares. He too was ordained a priest, but at the young age of 12. Bapsi was very keen that Rohinton be trained and ordained as a priest since mine was a 'priestly' family (hers was not), and she wanted the tradition to continue.[1] My father's maternal grandfather had been high priest of Surat – but neither my father nor I had undergone the rigorous ritual of priesthood.

As to how a lawyer from Bombay came to be appointed as a law officer in Delhi is another story. In 1967, H. R. Gokhale, who had retired prematurely as a judge of the Bombay High Court and had thereafter practised as senior advocate in the Supreme Court, took time off to contest (as an independent candidate) one of the Lok Sabha seats for Bombay city. His opponent was the Congress Party nominee, Shantilal Shah, a lawyer and a politician. Gokhale lost this election by a very narrow margin. He requested me to settle his election petition and to argue it in court. I succeeded in convincing the election judge in Bombay that a general recount should be ordered. But on appeal, a Constitution Bench of the Supreme Court modified the high court order (it was one of my first

appearances in the highest court). There was to be only a limited recount of the votes actually alleged to be wrongfully received. On that limited recount, the margin was reduced, but not enough for Gokhale to win. In the next parliamentary election of 1972, Gokhale again contested – this time as the Congress Party nominee. He romped home with a comfortable majority, securing both a seat in the Lok Sabha and a berth in the Union Cabinet (a double first!). Prime Minister Indira Gandhi appointed him as the law minister. Shortly thereafter, the post of additional solicitor general of India (which had been abolished in 1967) was revived, and Gokhale wanted me to fill the revived post. I was young and ambitious, and I readily accepted (‘too readily’ had been my wife’s laconic comment). But then, I had already declined one good offer and did not want to refuse another. It was in late 1966 that Justice Sorab Kotwal, chief justice of Bombay, pressed me to accept a judgeship at the Bombay High Court. In those days, an offer of judgeship to anyone under 40 was taboo without express clearance from the chief justice of India. I was nearly 38 and Kotwal told me that he had sought and obtained the necessary permission. He read out to me Justice J. C. Shah’s letter to him communicating Chief Justice Subba Rao’s approval to my being asked. But it was with great regret that I was compelled to decline the offer – for financial reasons. In those days, the monthly stipend of a high court judge had remained stationary since I joined the Bar in 1950 viz. Rs. 3,500. This amount was insufficient to support, in the same style of living, my immediate family of three (my wife and two children), and my dearest grandmother who was dependent on me. So despite Chief Justice Kotwal’s kind persuasion I simply could not afford the luxury and ‘prestige’ of being a high court judge!

Rohinton as a fully initiated Parsi priest

Fali Nariman's grandmother, Shirinbai Burjorjee

My grandmother, Shirinbai Burjorjee (my mother's mother), was the only family member in Bombay who was with me when I was in college and in my early days at the Bar; she and I were the closest of friends. She had a most beautiful complexion, and in her white saree and white *mathabana*

(cover for the head) she looked the spitting image of the Dowager Queen Victoria; but for me, better looking! Since my parents had gone back to Rangoon in 1947, during my days at the law college and my early years at the Bar, I lived with my father's cousin, Kaikushroo Dastur, then prothonotary and senior master (i.e., registrar) of the high court on its original side. He and his wife, Jer, and their children, Kersi and Soli, always treated me as a cherished member of their own family. They were a most happy household. I lived with them till I got married. My grandmother, Shirin, lived as a paying guest in a spacious room with another gracious family (the Mahalaxmiwallas) a few blocks away. I would visit her every evening simply because I was very attached to her and loved listening to her stories of old times. But there was another more selfish reason as well. In those strict days of prohibition, only granny had a generous liquor permit; I did not!

Bapsi and Fali Nariman with their children,
Rohinton and Anaheeta

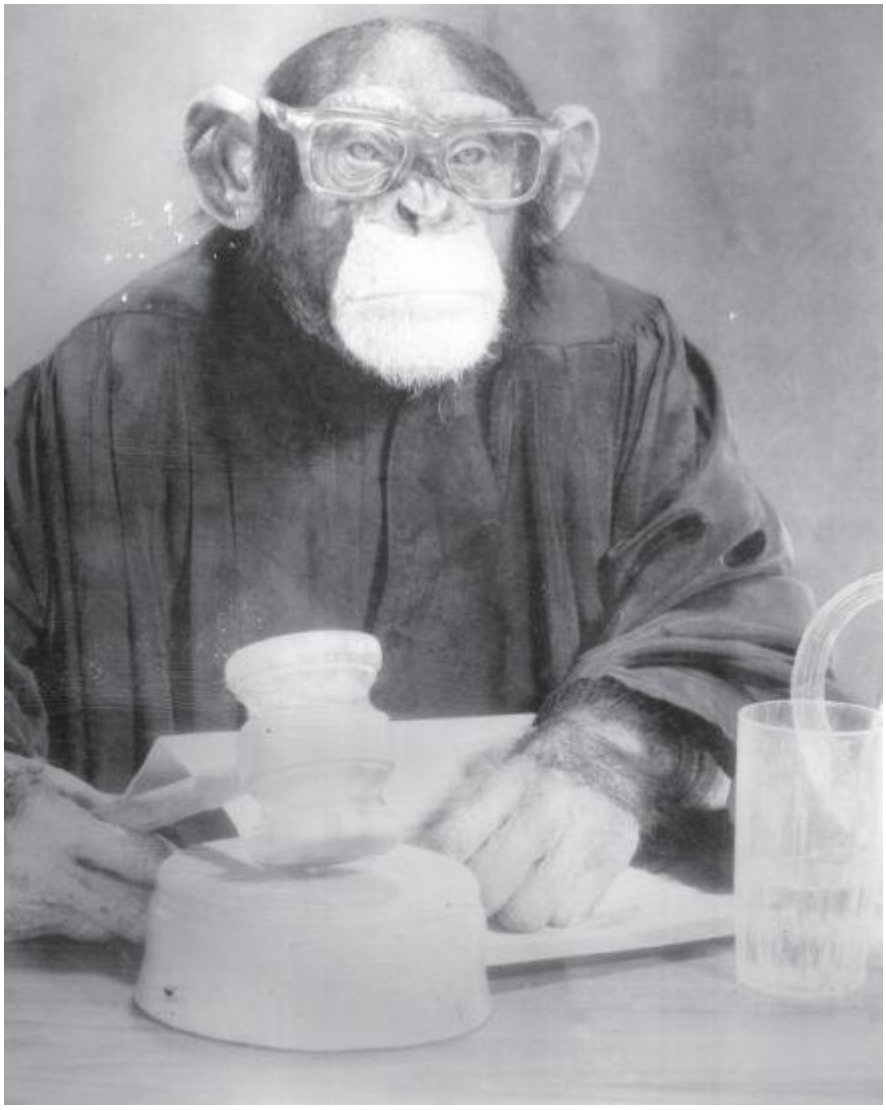
When I was offered a high court judgeship at the early age of 38, the reaction of the juniormost member of my family remains (for me) a treasured memory. Our daughter, Anaheeta (who was then only ten years old), when told by her mother that I had been asked to go on the bench and had declined the honour because of financial reasons, spontaneously said, 'Mummy, please tell daddy to accept; I promise I will not spend too much money, and will cut down on chocolates and sweets because I would like

him to be a judge.' Forty years later, she presented me with a cartoon picture depicting an ape-like character with oversized ears threatening to sentence some poor litigant for life. I have it framed, and it hangs outside my study-room door to remind me of 'The Judge You Might Have Been'.

Well, for me, accepting appointment as a law officer of the Union of India was different from declining the offer of a place on the bench of the Bombay High Court six years before. Although it meant shifting to Delhi, and private practice was forbidden, a law officer's remuneration by way of stipulated fees (Rs. 1,040 for appearance in each special leave petition and Rs. 1,680 per day for final hearings of appeals and writ petitions) did, at the time, add up to a comfortable figure. Besides, appearing for public-sector corporations and state governments for 'normal fees' was not prohibited. 'Normal fees' were hardly ever more than double the fees stipulated for appearances in matters of the Union of India. C. K. Daphtary, distinguished former attorney general who had reverted to private practice by the time I went to Delhi, ticked me off for accepting the post of ASG. He told me, 'Fali, you have made a grave mistake … with this government, you will find it a thankless job.'

The reaction of a trusted member of our household staff to my appointment as ASG in Delhi was no different than C. K. Daphtary's. Babu Kalidas had worked with us for many years – in fact, he always 'worked' as if he had long since retired from active service. Babu did not react with great enthusiasm when my wife told him I had been appointed additional solicitor general of India. He screwed up his face and said, '*Chalo (!) vela, vela* magistrate *thaye jai to saroo*' (Well, it will be good if he soon becomes a magistrate).

The Judge You Might Have Been



'I'd like to remind you that I can sentence you for life!
Now what was it you said about the size of my ears?'

Looking back, I have no regrets. From the time I joined in May 1972 till I quit (on 27 June 1975, when the Internal Emergency was imposed), I had the fullest cooperation of everyone in the government. My immediate superiors – Attorney General Niren De and Solicitor General Lal Narain Sinha – were strong pillars of support.

When we moved to Delhi – on the social side – we were privileged to be befriended by Piloo and Vaina Mody. Piloo was the most lovable Parliamentarian of his time (in the Lok Sabha from 1967 to 1977, and in the Rajya Sabha from 1978 to 1983). We were frequently invited to their home

where we were regaled with a well-stocked table and met the most interesting people in town.

Piloo Mody passed away nearly 27 years ago, but Bapsi and I fondly remember him. He never liked anyone to say something flattering about him! In his lifetime, he was a great leveller. He believed that the truly great were never so only because they held high office. In a city of obsequious 'Namastes' he strutted with his thumbs pointing upwards – hardly ever bringing his hands together except when describing how some great institution of democracy (like the press) was being 'throttled' by the government of the day! Lord Hailsham, former lord chancellor of England, was once asked to comment on an outspoken judge of his time, Lord Denning. Hailsham said that until a judge becomes a national institution (like Lord Denning) he should not answer back! Piloo always answered back – and no one took offence since he was in his own lifetime regarded as a national institution. He said what many others liked to say but were afraid of saying. He was the living exponent of that burning desire in every human being – to cut the high and mighty down to size! And he had that rare ability – not given to many politicians – to see the world from the Wolf's point of view! He believed that if ever there could be a good government he was the man to provide it. 'Look at my initials,' he would say with childlike simplicity, 'P. M.' Alas, the nearest he came to the high office was when he once scribbled a note in Parliament to Indira Gandhi, his political opponent. It began, 'Dear I. G.' and ended with the initials 'P. M.' Indira Gandhi responded in good humour in the same vein, 'Dear P. M.', she wrote, and signed 'I. G.'! Those were indeed gracious days. People in politics (on different sides of the political spectrum) were able to laugh at and with one another.

In 1979, Piloo had gone to visit Zulfikar Bhutto (who was his friend) when he was in prison in Pakistan awaiting a sentence of death for murder – it was widely believed he was innocent. He told me that in his conversation with Zulfikar Bhutto, the Pakistan leader nostalgically recalled 'the noise and chaos of Indian democracy', regretting that he had made fun of it in the heyday of his political power. The noise and chaos of Parliamentary democracy, he told Piloo, had a certain vitality; it had the strength and safety of numbers. No citizen's fate depended on the whims or dispensation of one man!

* * *

A few weeks after I took charge as ASG, I appeared on behalf of the Union of India in an appeal before a bench then presided over by Justice A. N. Grover. *Fonseca Pvt. Ltd. & Ors. vs L. C. Gupta & Ors.* (AIR 1973 SC 563) was an appeal to the Supreme Court of India by certificate granted from a judgement of the Delhi High Court in respect of its judgment in a writ petition filed by M/s Fonseca Pvt. Ltd., challenging an order made by the deputy secretary to the Government of India, Ministry of Works and Housing, under Rule 155 of the Defence of India Rules which directed that Fonseca Pvt. Ltd. should vacate the building at 1, Man Singh Road, New Delhi, within seven days from the date of the notice. The writ petition was dismissed by the high court. The only ground of challenge in the Supreme Court was that the Rules of Business framed under the Constitution did not authorize the deputy secretary to the Government of India, Ministry of Works and Housing, to issue the eviction order. During the hearing I was asked by the judges (A. N. Grover and A. K. Mukherjea) to produce the Conduct of Business Rules framed by the central government to answer the allegation of the petitioner that a ministry different from the authorized one had ordered the eviction of Fonseca Pvt. Ltd. from prime property on Man Singh Road, New Delhi (where the Taj Mahal Hotel is now located).

I complied and produced the relevant Conduct of Business Rules which were gazetted. They supported the contention of the petitioner. It was not the relevant authorized ministry that had sanctioned the eviction! When I returned home from the court that evening, I received calls from the prime minister's secretariat where officials at different levels told me how wrong I was in handing over (to the judges) the Conduct of Business Rules. I was told that it had been decided by the Union Cabinet a few months before that such rules were to be regarded as strictly confidential. I was unaware of this. I defended myself arguing that rules expressly authorized by the Constitution could not be confidential. The officials politely listened to me, but were not convinced. They trooped off to Attorney General Niren De, expecting support from him. Niren De carefully looked at the cabinet decision and the constitutional provisions, and then said (in clipped English as was his manner), 'Nariman is right; your cabinet decision is wrong!' Niren De and Lal Narain Sinha were both men of great stature and high

principles. They always treated me as a trusted and respected colleague, although I was years younger – both in age and standing in the profession.

At first, the Bar in Delhi was not pleased with my appointment. Some of its members resented the foisting of a union law officer from Bombay – and a 'Gokhale favourite' at that! They even drew up a protest resolution. In later years, some of its signatories (R. K. Garg and Gobind Mukhoty, to mention only two of them) were to become very close friends. A 'foreigner' in Delhi has to establish himself both in integrity and ability. Only then will the Supreme Court Bar accept him as one of their own. But once they do, its members are the most affectionate and loyal of all comrades.

When I joined as ASG, S. M. Sikri was the chief justice. Sikri was a gentleman to his fingertips. After a distinguished career as advocate general of Punjab, he was directly appointed to the Supreme Court – the first such appointee. He came to this court with no judicial experience, but always gave the impression that he was born a judge! Sikri listened, talked little, and thought a great deal – attributes of a good judge. By any reckoning, he was not a great judge – but in the end, it is the collectivity of good judges that go to make a great court.

I enjoyed my work as additional solicitor general and appeared in a large number of cases for the Union of India – in the Supreme Court, and in some of the more important ones in the high courts. I won some, lost some, invariably comforting myself with the motto of the Olympic Games: 'The most important thing in the Olympic Games is not winning but taking part; the essential thing in life is not conquering but fighting well.'

The first of the two notable cases that I lost in the Supreme Court of India was the *Newsprint* case (1973) before a bench of five judges presided over by S. M. Sikri, chief justice of India. It was also (pejoratively) called the *Newspaper Control Case*. That is what the majority decision in *Bennett Coleman* said, it was! In *Bennett Coleman & Co. Ltd. vs Union of India*,[2] I was briefed to defend the government's newsprint policy designed (the petitioners had said) to 'control the press'. Attorney General Niren De declined to appear in the matter for personal reasons and Solicitor General Lal Narain Sinha had asked that he be excused. So the third (and only other) law officer had to take on the assignment – there were only three law officers of the Union of India at the time. The petitions challenged the import policy for newsprint for the year April 1972 to March 1973 (and for the subsequent year as well) on the ground that it infringed the fundamental

right of press freedom; Article 19(1)(a) of the Constitution (guaranteeing to all citizens freedom of speech and expression) was invoked. The question raised by the petitioner was in effect whether the impugned newsprint policy was in substance newspaper control. The court held that 'the direct effect of the policy was restriction upon circulation of newspapers; the direct effect of the policy was upon growth of newsprint through pages; the direct effect of the policy was that newspapers were deprived of their area of advertisement; the direct effect of the policy was that they were exposed to financial loss; and the direct effect of all this was that freedom of speech and expression was infringed.'

I thought I had argued the *Bennett Coleman* case for the Union of India extremely well, but I only succeeded in convincing one out of the five judges – Justice K. K. Mathew – to accept my point of view. Justice A. N. Ray (not yet chief justice) wrote the majority judgment. He wrote glowingly about the freedom of the press and likened it to the 'Ark of the Covenant[3] in every democracy', which in retrospect was just pretentious posturing. Do not believe too much of what judges exuberantly say in their judgments. Often they say it for effect. They don't mean it. This very judge who spoke about the freedom of the press as the 'Ark of the Covenant' was the first to uphold the suppression of the press during the Internal Emergency imposed in June 1975. The Bible says: 'O put not your trust in princes, nor in any child of man: for there is no help in them.'[4]

But, in India we must put our trust in the judges simply because the Constitution has entrusted to their care and custody our fundamental rights. And nothing but the Constitution can ever answer the heart-wrenching question: 'Who will guard the guardians?'[5]

The second of the notable cases in which I did not succeed was *St. Xavier's College Ahmedabad vs State of Gujarat* (1975). The question there was whether Article 30, which declared as fundamental the right of all minorities (whether based on religion or language) to establish and administer educational institutions of their choice, extended to schools and colleges established and administered by minorities (religious or linguistic) for general secular education. When the *St. Xavier's College* case first came before a Constitution Bench of five judges at the end of 1973, counsel for the Teachers' Association (interveners) invited the court's attention to the opinion expressed by a former chief justice of India, P. B. Gajendragadkar (in his Tagore Law Lectures), which was to the effect that the decision of

the Supreme Court on minority rights in Articles 29 and 30 of the *Kerala Education Bill* case (1958)[6] – decision of a bench of seven judges – required reconsideration. Thereupon, the court passed an order referring the writ petition in the *St. Xavier's College* case to a larger bench. Chief Justice Ray had initially felt that the judgment of Chief Justice S. R. Das in the president's reference on the Kerala Education Bill, 1958, went a bit too far when it upheld the protection of Article 30 to minority educational institutions even where such institutions were imparting only general secular education. During this hearing before the larger Constitution Bench of nine judges presided over by then Chief Justice Ray, I thought I had made a presentable argument for the state of Gujarat on the true and correct interpretation of Article 30. The case for the petitioners, St. Xavier's (and other minority colleges), was put forth effectively by Nani Palkhivala, Frank Anthony and other counsel. I recall that during his arguments, Palkhivala also became a bit personal. With rhetorical flare he said pointedly, 'And My Lords where do law officers of the government prefer to have their children educated? In minority education institutions alone, My Lords?' – a dig at me and at the fact that my daughter, Anaheeta, was at that moment studying in Loreto Convent in Shimla (a Christian missionary educational institution)! The court's tentative view appeared (at the time) evenly balanced. Then came Motilal Setalvad – former attorney general, now appearing for one of the interveners (a minority institution)[7] – supporting the wide interpretation of Article 30 given by Chief Justice S. R. Das in his judgment of 1958. Virtually all he said was, 'My Lords, the doubts raised by the Additional Solicitor General have been adequately answered by my friends Mr Palkhivala and Mr Anthony. But I would submit that the doubts were resolved long ago in the authoritative judgment of Chief Justice S. R. Das.' And then, with one hand in his coat-pocket (as was his manner of addressing the court), he turned a full quarter circle, looking each one of the nine judges in the eye and said, 'Now, are there any questions that I have to answer? Are there any doubts left in the mind of any of Your Lordships for me to dispel?' To my mortification, not one of them – not one of the nine judges – had the temerity or inclination to ask him a single question, clearly leaving the impression that they were all convinced that there was nothing more to be said! The whole edifice of my carefully prepared argument had been demolished in one single stroke by the sheer force of a superb advocate's great and forbidding personality –

reminiscent of that haunting phrase of St Augustine when describing the imperial authority of Rome in the heyday of its empire: 'Roma locuta est, Causa finita est' (Rome has spoken, the case is closed). The case (for me) had certainly ended. Judgment came a few months later. It endorsed the view that secular education in minority educational institutions was permitted under Article 30.

Motilal had the hand of God on him. It is given to few to be able to hear their own obituaries. Motilal Setalvad did. During the time I was with the government, my secretary, O. P. Dua (who also worked part-time for him), told me one day (in March 1974) that Setalvad – who had been practising in the Supreme Court even after he resigned as attorney general (in December 1972) – was leaving Delhi that summer and had also decided (quite suddenly) not to return. I picked up the phone and asked Motilal. He confirmed it. I will always remember what he said: 'Look here Nariman. When a man has to go, he has to go.' At a hastily convened meeting of the Bar Association of India in April, members of the Bar dutifully and tearfully paid their tribute. It was an affectionate farewell. Setalvad had a premonition that the end was near. With a grand sense of timing, he knew – at 89 – when to go! He proceeded to Ooty (short for Ootacamund; the official name is Udhagamandalam) for his vacation (as he did every summer), and later went back to his home in Bombay. A couple of months later, he passed away. I have always believed that in the unfathomable unknown, he was someone special – someone upon whom Providence had always smiled.

I wrote a tribute for him in our journal, *The Indian Advocate* – the organ of the Bar Association of India.[8] It ended with these words:

> Old soldiers never die. They only fade away. Grand Old Men only die. But they never fade away.

Motilal Setalvad was not an affectionate or warm person, but he had his own way of expressing appreciation. I grew fond of him, and he of me, in his own fashion. R. K. Garg and I accompanied the grand old man to his car. He walked a few paces, turned back, and looking at me said (with a twinkle in his eye), 'Nariman, remember to keep the Bombay flag flying.'[9] And he was off. Neither of us saw him again. Setalvad was Garg's hero. Garg and I frequently opposed each other in court in later years, and when

he did not like a particular argument that I made in court (one that he felt should not have been advanced), Garg would remind me of Setalvad's admonition: I was not keeping the Bombay flag flying! I was letting down his hero!

* * *

In the early days of my tenure as ASG, I was specially asked to appear outside Delhi in an appeal in the High Court of Calcutta. It was before a bench presided over by Chief Justice P. B. Mukherjee. The Union of India was the appellant, being aggrieved by the judgment of Justice Sabyasachi Mukherjee,[10] who as a single judge had struck down as ultra vires the Constitution the entire Central Reserve Police Force Act, 1949. As a consequence, a contingent of about 40,000 armed police personnel of the CRPF (Central Reserve Police Force) had to be removed from Calcutta city. This was at a time when there was much rioting, looting and arson in the metropolis. Union Law Minister Gokhale told me that it was very important for the Government of India that I go and argue the appeal. When I reached Calcutta, I was received by the inspector general of the CRPF, who later came over to the hotel where I was staying. We discussed the law-and-order situation in the city, which was very tense. About the case, all he said was, 'Sir, I know nothing about the law or the constitutional position. But I can tell you that every judge of the high court, including the judge who decided against us, insists that only members of the CRPF should man security posts at their residences. None of them [want] the Calcutta police to protect them.' He then expressed another concern, 'I am afraid we are bound to lose in the appeal court since the judgment we want reversed is the judgment of the chief justice's close relative [Sabyasachi Mukherjee and P. B. Mukherjee were blood brothers]!'

I was quite disheartened by all this when I entered the court of the chief justice, the next day. This court – in a building as magnificent as the Bombay High Court building – contains an impressive, larger-than-life-size oil painting of the first chief justice of Bengal, Sir Elijah Impey (1732–1809).[11] It is still in a good state of preservation. I had never appeared before Chief Justice P. B. Mukherjee. In fact, I had never seen him before. When appearing before judges with whom one is unfamiliar, the 'trick' is to

test the ‘state of the ground’ – to make an argument and then repeat it. After that, one should go to another point and come back to the first argument (just to be sure the judges have understood you). I followed my little routine, only to be pulled up by the chief justice when I repeated myself the first time, ‘But Mr Solicitor, you made this argument a moment ago!’ P. B. Mukherjee (even though ailing at that time) had a mind that was clear and resonant. My entire submission did not take more than an hour and a half. The appeal was over before lunch. ‘Brother’ Sabyasachi Mukherjee’s verdict was reversed, to the immense relief (and satisfaction) of the inspector general!

* * *

In 1973, the Law Council of Australia asked the Government of India to send a representative to one of its biennial conferences in Perth. As India’s additional solicitor general, the law minister deputed me to attend the conference. One of the chief guests was Lord Widgery, then lord chief justice of England and Wales. I recall that at a time when terror and terrorism was almost exclusively confined to the movies, Chief Justice Widgery was already propounding the view that criminal law in the common-law world was deficient, precisely because it placed an undue burden on the prosecution. There was no basic unfairness (he said) in a procedure that provided for *horrendous* crimes to be decided on a balance of probabilities, with the person charged being required to testify, as in civil cases, when civil liabilities are imposed.[12] I participated in the deliberations at the conference held in Perth, and (as a bonus) was treated by the Australian Government to a tour of the major cities of Australia! One indelible impression during this tour was witnessing (when sitting in a plane) a cabinet minister running on the tarmac to catch the plane (his aide closely following)! In Australia, they practise (not merely preach) equality; sitting in the aircraft, I vividly remember Lionel Murphy, then attorney general of Australia, ‘legging it’ to get into the aircraft before the doors closed, his tie flowing in the wind; and when he did enter the plane, out of breath, no one – just no one – got up and gave him a seat. There was no reserved seat for the minister; he went to the end and sat on an empty seat at

the rear! I have never seen – and I never expect to see – a cabinet minister in India running to catch a plane.

This was my first trip abroad as a representative of the Government of India. On this occasion I was privileged to meet Sir Harry Gibbs, a judge of the High Court of Australia, later to become chief justice of Australia (from 1981 to 1987). I came to know him well. He was a regular member (like I was) of LAWASIA – an association of lawyers in the entire Asia-Pacific region, including Australia and New Zealand. Later, in 1985, when I was elected president of LAWASIA, I worked closely with David Geddes of Sydney who was LAWASIA's secretary general. We attended many conferences at different places in the region. Sir Harry Gibbs was once asked how he would define an independent judge. His answer was: that judge who has nothing to hope for, nothing to fear, in respect of anything done in the performance of his judicial functions; that judge who is able successfully to resist pressures of any kind.

I mention this because I was a witness – in the year 1983 – to an incident as to how 'pressures' (when least expected) can be exercised, and resisted – even at a convivial meeting! It was at one of our LAWASIA functions in Manila during the presidentship of Raoul Goco, a Filipino lawyer. It was at a time when the misdeeds of President Ferdinand Marcos of the Philippines had become all too apparent. Despite overtures to the office-bearers of LAWASIA, we all politely declined the invitation to call on the nation's president! But the innovative Filipino head of LAWASIA (Raoul Goco) – not to be outdone – specially organized a lunch in honour of the mayor of Manila – who happened to be Imelda Marcos (then first lady) – which of course no one could refuse to attend.

President Giani Zail Singh with Fali Nariman (during the latter's tenure as president of LAWASIA) at a reception for delegates of LAWASIA hosted by the president

Sir Harry Gibbs was seated on the high table next to Imelda Marcos, and as the lunch was winding down to a close, Raoul Goco sprang his surprise. He suddenly announced (without previously consulting the chief justice of Australia) that 'Sir Harry Gibbs will propose a toast to the First Lady'. A real dilemma for Harry – if, as chief justice of Australia, he had spoken even a few inane words in her praise, he would have been torn to shreds by the Australian press the next morning. If he didn't raise a toast, he would be exhibiting appalling bad manners! I was sitting a few places away from Harry – aghast at Goco's summons, and watchful of the reaction of Australia's chief justice. Harry did not bat an eyelid. He walked to the podium, picking up a glass of brandy on the way. First, a few kind introductory words of no moment, and then Sir Harry Gibbs asked all those present to raise their glasses. Everyone raised their glasses, everyone, except Imelda Marcos (obviously, because she was to be the recipient of the 'toast'). It was then that Harry sprang his surprise: 'Ladies and Gentlemen,' he said, 'I ask you to drink a toast to (a long pause) – LAWASIA!'

Another embarrassment for the first lady, but to her credit, she quickly grasped her glass of liquid refreshment, and (biting it – as it appeared to me) drank to the health of that impersonal amorphous organization! The mayor of Manila could not have enjoyed her lunch that afternoon. But I greatly admired the response of the independent chief justice of Australia to the instant summons to toast Imelda Marcos!

I said to myself, 'An independent judge thinks on his feet.'

This stirring but true story of yesteryear has a moral – in the end, judges howsoever appointed, whether by the lord chancellor or government or by an independent committee or whatever, must have the capacity to resist direct or insidious pressures of any kind; which in turn reflects on the quality of men and women who deserve to be appointed.

If such a judge is able to withstand pressures, to which the higher judiciary is so frequently and constantly exposed, then it does not matter which body of persons is entrusted with his or her appointment.

* * *

In early 1975, I was engaged by the union government as lead counsel to deal with a group of preventive detention cases under the Smugglers Act (in full: The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974). A large number of influential persons (each of whom, though only much later, had themselves confessed to Jayaprakash Narayan[13] their nefarious activities) filed petitions challenging their detention. I was asked by the Government of India to address the leading argument in the first case, which was posted (as a test case) before a division bench of the Delhi High Court. The grounds of detention had been carefully framed based on the material present in the files. There were long arguments lasting several weeks. At last, the hearing was over and the judgment was reserved. On a particular Friday morning in April 1975, I was informed that the judgment would be delivered that afternoon in the group of preventive detention cases. At about 3 p.m., I was informed that the judgment had already been delivered: the petitions had been allowed, and all detainees were directed to be set free. Since there were no court sittings over the weekend, I promptly went to Court No. 1 (in the Supreme Court), interrupted the proceedings before the Constitution Bench (presided over by Chief Justice Ray), and without any written application, orally asked for a stay of the judgment of the Delhi High Court. Chief Justice Ray told me, 'Mr Solicitor, in a matter of personal liberty when there is not a scrap of paper to go on, not even the judgment of the high court before us, how can we possibly grant you stay?' I left fretting and fuming. The detainees under preventive detention once released (like the genie in the bottle) could never be put back again, even if the appeals against the judgment of the Delhi High Court were admitted and ultimately allowed.

A conference was urgently summoned in the office of Finance Minister C. Subramaniam, which Law Minister Gokhale also attended. We all commiserated with one another but felt helpless. There was a suggestion that powers under Article 226 ought not to be used in preventive detention cases, and that there should be a constitutional amendment to that effect. I demurred. Though we had lost, I said that preventive detention was an exception to the normal rule of 'no imprisonment without trial', and that I for one was impressed with Justice Ray's expression of concern for personal liberty, irrespective of the personalities involved in these detention cases. The ministers listened to me moodily, unconvinced. After leaving them, I argued with myself, and even convinced myself that although the

high court ought not to have chosen a Friday afternoon to deliver this judgment (making it difficult for the government to move the Supreme Court), the Supreme Court was not wrong in refusing a stay of the Delhi High Court judgment since the matter concerned the personal liberty of the subject, and it was this factor which motivated the judges of the Supreme Court not to interfere on a mere mentioning of the matter.

However, witness my disappointment when sometime in July or August 1975 (after the imposition of the Internal Emergency of 26 June 1975 and after I had quit my post), I was present in the court of the same chief justice. That morning, the newspapers carried a detailed news item that political detainees (all members of the Bombay Municipal Corporation) had petitioned to the Bombay High Court that they should be allowed to cast their votes in the forthcoming mayoral elections. The newspapers also reported that the Congress Party-led state government had opposed the request but the high court granted the plea on the ground that preventive detention did not deprive members of the corporation from exercising their franchise. Their votes could be recorded if necessary, even at the place of detention. With this news item in hand – only the news item – I heard the then solicitor general of India apply orally (in Court No. 1 – the chief justice's court) for a stay of the judgment of the high court. A copy of the judgment of the high court was not even placed before their lordships. Promptly (too promptly, I felt), the judges granted the application. The judgment and the order of the high court were ordered stayed. The detainees (six or seven in number) could not exercise their franchise in the mayoral election. The election went on, and the Congress Party candidate was declared elected. He would have lost if the detainees had been allowed to vote! Ever since this incident, I have never been too greatly impressed by expressions of concern by our judges for personal liberty!

* * *

I had been reappointed additional solicitor general for another three-year term on 1 May 1975, on the assurance of Law Minister Gokhale that the post would be upgraded very soon. From July (he had promised) there would be two posts of solicitor general. The second was for me. More grist to my ambitious mill! But as the saying goes, 'The best-laid plans of mice

and men go oft awry.'[14] For me they went totally 'awry' with the sudden Proclamation of Emergency on the morning of 26 June 1975 – an Emergency that was contrived (hence 'phoney') – a half-baked and ill-considered measure, hastily devised by the close advisors of Prime Minister Indira Gandhi only to offset the consequences arising out of a possible eventuality, viz. refusal of the Supreme Court (then in vacation) to accede to her request for an absolute stay of the Allahabad High Court judgment. It will be recalled that on 12 June 1975, Justice Jagmohan Lal Sinha of the Allahabad High Court had pronounced judgment in the election petition filed against Indira Gandhi (by Raj Narain). The judge had held her guilty of corrupt practices, disqualifying her from holding all public office (a statutory six-year disqualification). I had occasion to read a copy of the judgment of Justice Sinha when it was brought to me by J. B. Dadachanji who was the advocate-on-record for Indira Gandhi in the contemplated proceedings in the Supreme Court. J. B. Dadachanji and Co. was the most prestigious law firm in Delhi in those days, and Jimmy Dadachanji (bless his soul) was its seniormost, most-popular partner. There were several meetings and discussions about Sinha's judgment with Law Minister H. R. Gokhale and the principal secretary to the prime minister, P. N. Dhar. In fact, at that time, hardly anything else was being discussed in the government or outside. In my view, the judgment was singularly weak in its reasoning, and I mentioned this to both Dhar and Gokhale. I was told that Indira Gandhi had personally requested that I should vet the grounds of appeal as also the stay application (to be filed in the Supreme Court) even after her own senior advocate, the distinguished Nani Palkhivala, had settled them. I was flattered. I went through the papers and suggested a few changes. On 19 June, the verification paragraphs of the petition were also scrutinized. Filing of the petition of appeal was delayed for another day or two to select the most astrologically auspicious date!

Indira Gandhi had around her some efficient ministers, as also three other groups of people. First, there were the sycophants; second, some able lawyers; and third, astrologers. The astrologers advised that her appeal should not be filed on a particular day as resolved (I forget now which particular day) but on the next day which according to them was more propitious. The advice was heeded. The stay application was listed before the vacation judge, Justice V. R. Krishna Iyer, on 22 June 1975. Palkhivala argued the application for Indira Gandhi and orders were reserved. The next

evening my wife and I left for Bombay on a brief holiday by the Rajdhani Express, expecting to return in a few days. In the train, I read an item of interest which was tucked away in one of the inner pages of the *Evening News*. Home Secretary Nirmal Mukerjee had been transferred, and a new man from Rajasthan, S. L. Khurana, had taken over. A new home secretary in the Government of India! Why so suddenly? Odd, I thought to myself, but then paid no further attention to this matter.

Seemingly insignificant incidents sometime portend the heralding of momentous events. It has been recorded that the onset of the French Revolution could have been predicted if only people had observed what had happened in the weeks before – French bakers were not baking bread any longer, though bread is the staple diet of the French. They were using the hot ovens in the bakeries to make swords out of ploughshares! Alas! I had no such foreboding about the Emergency. Even the news item of the sudden transfer of the home secretary conveyed (at the time) nothing to me. In retrospect, it was apparent that preparations were afoot (unknown to all but those closest to Indira Gandhi) to make firm contingency plans in the event of an absolute stay being declined by the Supreme Court.

My friend Red Austin (Granville Austin), after painstaking research, has recorded the following in his book:[15]

> As of 15 June, Sanjay Gandhi[16] had begun developing 'some plans to set things right', as he later reportedly said to a friend. Working at the Prime Minister's house (the 'PMH'), he began to prepare arrest lists, along with Minister of State for Home Affairs Om Mehta and Haryana Chief Minister Bansi Lal, a friend of Sanjay's, and R. K. Dhawan, an additional private secretary to the prime minister. Delhi Lt. Governor Krishan Chand later testified to the [J. C.] Shah Commission [set up by the Janata Government that came to power after Indira Gandhi and her Congress Party were defeated in the general elections of March 1977] that he had seen the lists at the Prime Minister's house and that R. K. Dhawan had told him on 23 June, that opposition leaders might have to be arrested that day.

Justice Krishna Iyer's order was handed down on 24 June 1975. It was only a conditional stay, not an absolute one. 'Operation Emergency' promptly swung into action with the acquiescence of India's president,

Fakhruddin Ali Ahmed. He was prevailed upon by three prominent lawyers – H. R. Gokhlale, S. S. Ray and Rajni Patel (all members of the Congress Party) – to sign the proclamation that they brought to him. Fakhruddin Sahib was, of course (before his election as president of India), an old Congress stalwart, but he was a distinguished lawyer as well, a former advocate general of Assam, one of the best lawyers in that state.

Even before the council of ministers (the cabinet) met and approved the Proclamation of Emergency on the morning of 26 June, it had already been signed the previous night by a pliant president. I recall the remark of one of the most competent members of the cabinet at the time, Babu Jagjivan Ram (Babuji). He was asked by Indira Gandhi at the early-morning cabinet meeting of what he thought of the decision. Babuji deftly evaded the question saying, 'Madam, what can I say about a decision that you have already taken!'

It was reported that when, during the midnight of 25 and 26 June 1975, the lawyers went to the president to get the proclamation signed, the president, after appending his signature to the document, took a sleeping pill. I have always said that it would have been better for the country if he had taken the sleeping pill before signing the proclamation. In that event, when he awoke he might have had second thoughts before he signed the 'warrant for dictatorial rule' (which happily – happily only in retrospect – was a brief one).

A constitutional head of state has a very useful, though benevolent, role in our constitutional scheme of things. There are many areas of silence in our Constitution, and that is where the president can quietly influence, without fanfare, decision making. The president could have delayed signing the proclamation till after the cabinet meeting (to be held the next morning), and who knows what would have happened? It was this precipitate act of the head of state at the entreaties of prominent lawyers that enabled the government to pick up and detain in the dark hours of the night all political 'heavyweights' in the opposition – both at the centre and in the states. They (and hundreds of others) were detained before they knew what had hit them.

Notes and References

1. In the decades following the defeat of the Persians by Arab invaders at the Battle of Nehavend (ad 642), successive waves of Zoroastrians mainly from the province of Fars landed on the West Coast of Gujarat and were granted refuge by local rulers. The high priests at Navsari, Surat and Udvada decided – somewhat arbitrarily – those who could be ordained as priests, and families whose members could not take up priesthood; they reasoned that if all Parsis (literally from Fars) became priests and attended the worship by the faithful at fire-temples, there would be no one to till the land or to undertake non-priestly activities!

2. *Bennett Coleman & Co. vs Union of India*, AIR 1973 S.C. 106 (judgment dated 30 October 1972).

3. The Ark of the Covenant is described in the Bible as a sacred container wherein rested the tablets of stone containing the Ten Commandments (the Law of Moses).

4. From the *Book of Psalms*, cxlvi. 2.

5. From the Latin phrase, '*Quis custodiet ipsos custodies?*' of the Roman poet, Juvenal, variously translated as '*Who watches the watchman?*' – '*Who will guard the guards?*' (see Wikipedia). The saying has since been used by many people to ponder the insoluble question of where ultimate power should reside. The way in which modern democracies attempt to solve this problem is in the separation of powers. The idea is to never give ultimate power to any one group, but to let the interests of each (the executive, legislative or judicial) compete and conflict with one another. Each group will then find it in its best interest to impede the functioning of the rest, and this will keep ultimate power under constant struggle and, thereby, out of any one group's hands.

6. Re: *Kerala Education Bill* case AIR 1957 SC 956 (judgement dated 22 May 1958)

7. An intervener is a person or group who is not a party in the case but has been permitted by the court for special reasons to appear in it.

8. Published in *The Indian Advocate*, January–June 1974, pp. 3–4, New Delhi.

9. He never forgot Bombay where he had been advocate general and had resigned that position during the Quit India Movement in 1942.

10. Justice Sabyasachi Mukherjee was appointed to the Supreme Court in 1983, and in 1989 became chief justice of India.

11. He was educated at Westminster with Warren Hastings, who was his intimate friend throughout his life. Having been called to the Bar in 1756, in 1773 he was appointed the first chief justice of the new Supreme Court at Calcutta, and in 1775 he presided at the trial of Maharaja Nandakumar for forgery. His impeachment was unsuccessfully attempted in the House of Commons in 1787, and he was accused by Macaulay of conspiring with Warren Hastings to commit a judicial murder. But the trial of Nuncomar has been examined in detail by Sir James Fitzjames Stephen (who drafted the Indian Evidence Act, 1872). Fitjzames Stephen has written that ‘no man ever had, or could have, a fairer trial than Nuncomar, and Impey in particular behaved with absolute fairness and as much indulgence as was compatible with his duty’ (from Wikipedia). This view, however, is not shared by historians in India.

12. See my article in the *International Bar Association's Journal – International Legal Practitioner* – Vol. 28, No. 3, November 2003, pp. 102–103. In it I had said:

It is time that we recognise that in ‘terrorist related offences’ (which can be suitably and precisely defined: (viz. where the terrorist is found in actual possession of particular offensive weapons or noxious substances) what is known as the right to silence is not really a right

but a privilege, and although every accused has a right to be presumed innocent till he is proved guilty, in terrorist related crimes the accused has an obligation to assist in the discovery of the truth: as such it is suggested that in terrorist related crimes the accused should not have any right to remain silent. The accused, like any other witness knowing the facts, must give evidence: a presumption to be drawn from his failure to give evidence is not enough; this might well conflict with the presumption of innocence; hence there should be a positive obligation imposed by law on such a person to assist in the investigation and if so required by the Court give evidence: this would not transgress 'the rule of law' but further the purposes of the law. It would not be a disproportionate response to the serious problem of terrorism.

13. Jayaprakash Narayan (1902–1979) was called 'the conscience keeper of the country'. He was the key figure in ensuring (through peaceful means) that many dacoits of the Chambal region surrendered in the early 1970s. In 1974, he started a mass movement in the country, which ultimately led to the imposition of the Emergency by Prime Minister Indira Gandhi in June 1975. He was jailed for his efforts, after which his condition deteriorated. He was instrumental in bringing together diverse political groupings under the Janata Party in 1977.

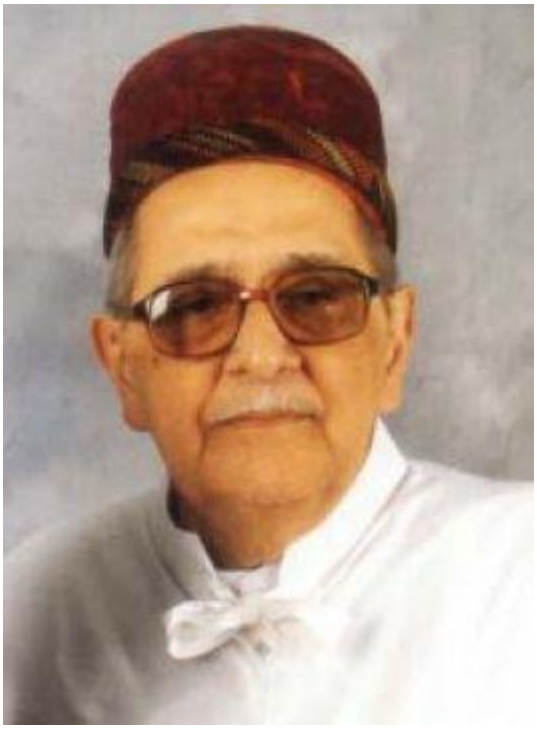
14. A Scottish phrase; *Of Mice and Men* is a novel by John Stein Beck (a Nobel Prize-winning author) published in 1937, Covici Friede (Publisher). The title is taken from a poem by Robert Burns, 'To a Mouse'.

15. *Working a Democratic Constitution – The Indian Experience* (1999), Oxford University Press, New York, p. 303.

16. He was Indira Gandhi's younger son, known for his brash and sometimes ruthless ways. Her elder son was Rajiv Gandhi, a quiet and dignified person who became the prime minister of India after his mother was assassinated on 31 October 1984.

Rohinton performing the Navjote ceremony of his sister Anaheeta in Bombay

Fali Nariman's daughter, Anaheeta, receiving her passing-out certificate from Clarke's School, Massachusetts, USA



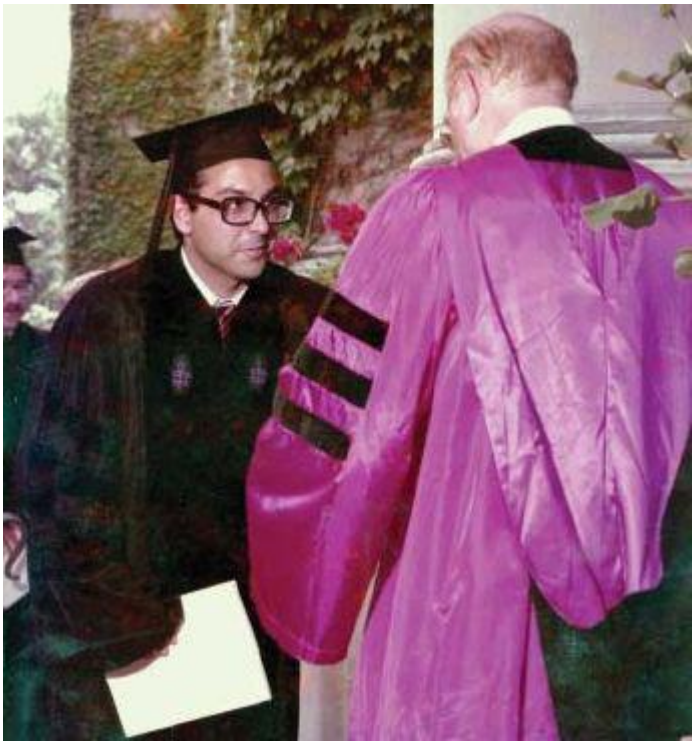
Fali Nariman in traditional Parsi attire

Fali Nariman in court dress

Fali and Bapsi with ‘Bobo - The Biter’; his junior S. C. Sharma
can be seen in the background

The Narimans with the Dubash family

Bapsi with Rohinton and Anaheeta



Rohinton Nariman receiving his master's degree at Harvard

Fali Nariman and Bapsi flanked by friends, Sam and Phiroza Nariman
of Hong Kong, in traditional Parsi attire

Bapsi and Fali Nariman on a holiday

Counsel calls the judge ‘Mister’ instead of the right form of address

A sketch of Fali Nariman by Senior Advocate Vinod Bobde

Another sketch of Fali Nariman entitled ‘The advocate talks too much’

The Nariman clan

Fali Nariman with former maharaja of Baroda (*middle*) who was the chairman of the World Wildlife Fund when Fali was its trustee

Fali Nariman at Algonquin Provincial Park, Canada

Bapsi and Fali Nariman at Iguazu Falls, located on the
border of Argentina and Brazil

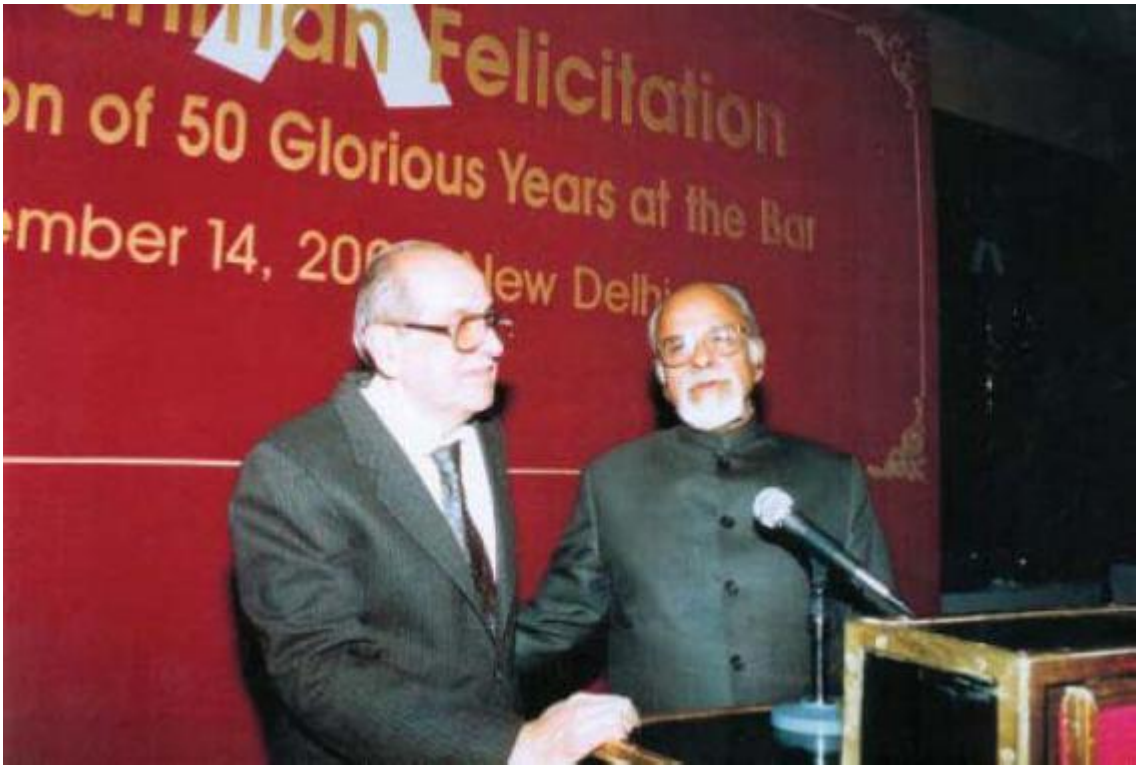
Fali and Bapsi Nariman with dear friend
Minoo Mehta on a chariot in Ireland

Fali Nariman with Lalit Bhasin and S. C. Sharma

Fali Nariman with the legendary Khushwant Singh at the
Padma Bhushan Award function in the Rashtrapati Bhawan

President R. Venkataraman presenting Fali Nariman with the Padma Bhushan (1991)

Fali Nariman with H. R. Khanna at the felicitation function to celebrate the former's 50 years at the Bar



Fali Nariman with former prime minister, I. K. Gujral

Fali and Bapsi Nariman at their house in Delhi

Chapter 8

The Internal Emergency

One of the lessons of the Internal Emergency (of June 1975) was not to rely on constitutional functionaries. These functionaries failed us – ministers of government, members of Parliament, judges of the Supreme Court, even the president of India.

The night of 26 June was the next (and the *most important*) turning point in my professional career. I decided to quit my office, though with some trepidation. The next morning I informed the private secretary to Law Minister Gokhale (who was not immediately available) of my decision over the telephone from Bombay. I then drafted, signed and posted to Delhi a one-line letter of resignation. There were no heroic passages in it. With the imposition of censorship, the news of my resignation was suppressed in the Indian press. However, it was published in the *New York Times* and in a few other newspapers abroad. Hence, news trickled in from overseas. A number of my colleagues telephoned to congratulate me. Shanti Bhushan,[1] I recall, was one of them; Micky Chagla (Iqbal Chagla) – a good friend – was another. But news of my having quit government permanently was not known – not even to my own staff.

* * *

Three months before the Emergency had been clamped, there had been a bomb scare. Near the Supreme Court premises, an unidentified person had dropped what looked like a bomb into Chief Justice Ray's motorcar when it had stopped at a traffic light. As it turned out, the bomb was a dud. But Chief Justice Ray got the fright of his life and had to be rested at home for a day or two for breathlessness and related ailments. Attorney General Niren De insisted that all three law officers (along with all the judges) must get some security protection. Accordingly, a plain clothes policeman with a hefty revolver was deputed at my residence. He followed me wherever I went, even for my evening walks in the Nehru Park.

It has always struck me since then that the psyche of important persons in the government and outside who get police and security protection is different from the psyche of all other ordinary citizens. When ultimately news of my resignation percolated through the various ministries, two or three weeks after I had resigned, my security guard was withdrawn. For a month or two, I genuinely felt insecure! This security factor works on your psychology, and when you lose it, you feel unsafe to go out alone. When security had been provided for me, I came to believe that I must be a very important person whose life needed protection, and when security was suddenly withdrawn, I felt unprotected.

* * *

At the end of June 1975, I made my first appearance in a private litigation in the court of the chief justice of Bombay. It was before a bench of Chief Justice Kantawalla and Justice V. D. Tulzapurkar (then a judge in Bombay; in September 1977, he was appointed judge of the Supreme Court of India). On seeing me, I heard Chief Justice Kantawalla loudly whisper to Tulzapurkar, 'Nariman has resigned as law officer.' Tulzapurkar – a fine, brave judge – audibly told Kantawalla (who was quite deaf in one ear), 'I don't quite know. I believe he has resigned in order to appear for Mrs Gandhi.' In some circles, that was the current rumour because Palkhivala (after 26 June 1975) had returned her brief in the Supreme Court against the judgment of the Allahabad High Court in her election case.

The most repressive of all our States of Emergency was the Internal Emergency of 25 June 1975[2] when I resigned my post as additional solicitor general. A few months thereafter, I was witness to an incident which typified the 'climate of the times' – how, in Lord Acton's hackneyed phrase: 'Power tends to corrupt, and absolute power corrupts absolutely.'[3] Before the Internal Emergency of 25 June 1975, I had been invited to preside at a conference of Andhra state lawyers (to be held at Rajahmundry in August 1975) in my official capacity as a law officer of the Union of India. Justice Krishna Iyer, then a sitting judge of the Supreme Court of India, was to inaugurate the conference. I wrote and informed the organizers about my resignation but they insisted that I come and preside in my private capacity as a senior advocate. Despite the Internal Emergency,

about 2,000 lawyers of the state attended the conference. When we arrived, the organizer (a senior lawyer of the district) informed us with anguish that his son, a law student at Visakhapatnam who was to assist him in the arrangements, had been arrested under the Maintenance of Internal Security Act (MISA) a day before our arrival. He was a conscientious student – almost obtusely so. When his lecturer had announced in class (at Visakhapatnam) sometime at the end of July 1975 that they would all march in procession on a particular weekday in support of Prime Minister Indira Gandhi's 20-Point Programme, he got up and said that time was better spent studying in college, and that the procession should be postponed to a non-working Saturday! The rest of the students shouted him down; marching in a procession would be far more fun than attending classes! The boy insisted and some argument ensued. Then there was a weekend recess and the boy came back to his home in Rajahmundry. And there, apparently, the matter rested. But then, a district magistrate in whom wide powers of detention were conferred chose to exercise them when he heard of this 'misdemeanour'. He promptly issued an order of detention on the ground that the boy was a 'danger to the security of the State'. The order of detention was served at the boy's home in Rajahmundry from where he was whisked off in the dark hours of the night! Fortunately, the then law minister of Andhra Pradesh was one of the principal guests at the conference, and some of us requested him to personally look into the matter, which he graciously did. The order of detention was revoked a few days later. But then, the boy could not be located! No one knew where he was put away. He was ultimately found after three weeks in some jail in a remote part of the state, and finally (after many anxious moments) returned to his parents. No one in Delhi instructed the district magistrate to act as he did. In fact, South Block would have been aghast at such irresponsible behaviour. But the point of this true story is that once laws are passed which enable officials to act irresponsibly, then in this country (and possibly in other countries as well) they will act – with hobnailed boots!

With such repressive laws, so oppressively implemented, the people looked up to the courts. But as it ultimately turned out, they looked in vain.

During the Emergency of June 1975, now acknowledged by all but the most obtuse to be a contrived one (hence 'phoney'), the Supreme Court of India handed down in April 1976 one of its most-deplorable decisions in *ADM Jabalpur vs Shukla*.[4] Some background to the case is necessary. After

the Proclamation of Emergency of 26 June 1975, under Article 352 of the Constitution, the Presidential Order issued on 27 June 1975 (under Article 359 of the Constitution) suspended the right of all detenus to enforce any of the rights conferred by Article 14 (the equality clause) and Articles 21 and 22 (safeguards for personal liberty) of the Constitution. All rights conferred by Article 19 (right to freedom) stood automatically suspended (under Article 368 of the Constitution) with the declaration of Emergency. The question was whether those preventively detained were entitled to invoke the jurisdiction of the high courts under Article 226 of the Constitution, and whether the high courts could issue writs of habeas corpus (literally, a writ commanding a person to be brought before a judge to investigate the lawfulness of their detention). Nine high courts in the country, including the high courts of Allahabad, Bombay, Delhi, Karnataka, Madhya Pradesh, Punjab and Rajasthan, held that, notwithstanding the imposition of the Emergency and the Presidential Order, courts were empowered to examine whether orders of detention were in accordance with the Maintenance of Internal Security Act (MISA) under which detenus were detained. The concerned state governments and the Union of India filed appeals in the Supreme Court. There were rumours that Chief Justice A. N. Ray would constitute a bench of judges favourable to his supposed point of view. To prevent this, a few of us approached C. K. Daphtary (former attorney general) to intercede with the chief justice so that we did not get a 'hand-picked' bench.

Now it is the prerogative of a chief justice to determine who should sit on a particular bench. But Daphtary went and made the odd request. Puffing on his pipe, he said to Chief Justice Ray, 'I hear, Chief Justice, that you are going to constitute this Bench to hear the preventive detention cases.' He said, 'Yes.' And Daphtary said, 'It is causing some concern at the Bar, so may I make a suggestion?' And Ray, sensing what he was going to suggest, said, 'Has it ever been suggested to a Chief Justice as to how to constitute a Bench and who is to be put on that Bench?' Quick as a flash, Daphtary retorted, 'Well I do recollect that on a prior occasion when Chief Justice S. R. Das was told about the composition of a Bench he never took it ill.' Justice A. N. Ray, immediately on the defensive, said, 'I am not taking it ill.' Chief Justice S. R. Das (you see) was the great guru and mentor of A. N. Ray! Well, there the matter rested. The bench was ultimately announced, and we were all pleasantly surprised that it was not hand-picked; it

comprised the five seniormost judges of the court. A sense of relief, but not for long; but that's another story!

I never asked Chandubhai whether he (or who) had questioned Chief Justice S. R. Das about the composition of the bench in the past, because I suspected (and I still do) that no one ever had, and that this 'ploy' only came to CK in a flash. But it worked!

During the hearing of *ADM Jabalpur* in the Supreme Court, the then attorney general of India was specifically asked by Justice H. R. Khanna – one of the judges on the bench – whether there would be any remedy if a police officer, because of personal enmity and for reasons which had nothing to do with the state, took into detention a law-abiding citizen and even put an end to his life. The answer of the attorney general was unequivocal, 'Consistently with my argument,' he said, 'there will be no judicial remedy in such cases as long as the Emergency lasts.' The attorney general then told the judges:

> 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 during the Emergency.[5]

This was the consequence of suspending the fundamental right under Article 21 (right to life and liberty). According to the counsel for the government, courts were powerless to prevent any possibility of abuse; they could not grant redress. This extreme contention found favour with four out of the five seniormost judges of the Supreme Court who sat to decide *ADM Jabalpur vs Shukla* (euphemistically called *The Habeas Corpus Case*) – euphemistic because the writ of habeas corpus which was granted by each one of the nine high courts in the country was denied by the highest court. The judgments of the high courts of India which took the contrary, more liberal view, were declared erroneous, and set aside by the apex court. By denying habeas corpus, the Supreme Court had set back the clock of liberty, proclaiming its helplessness against arbitrary arrests and mala fide detentions. It was judicial pusillanimity at its worst!

The lone dissent was that of the seniormost judge in the Supreme Court (next only to Chief Justice Ray), Justice H. R. Khanna, who refused to rationalize tyranny. He would not bow down to insolent might. 'Life and liberty are not conferred by any Constitution,' he said, 'they inhere in men

and women as human beings.' But Khanna was in a minority – a brave minority of one.[6] Historians of the Supreme Court will doubtless record that it was only in the post-Emergency period (not during the Internal Emergency of June 1975 March 1977) that the highest court gave vent to expressions of grave concern about violations of human rights! A sobering thought for human rights activists – and for judges and lawyers.

In a book titled *Six Men*,[7] Alistair Cooke, eminent broadcaster and commentator, says of the late Duke of Windsor (for a few months King Edward VIII before he finally abdicated), '*He was always at his best when the going was good*.' It was when the going was rough (while the Emergency of June 1975 lasted) that a few of our judges (alas, too few!) were at their best. One of them (and the most notable of them) was H. R. Khanna, with his lone dissent in the infamous Emergency Case (*ADM Jabalpur*). He showed what a brave judge could do. '*The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.* '[8] Khanna knew, when he signed his dissenting judgment, that he was signing away his future chief justiceship – which was only a few months hence. Khanna was No. 2 on the court (seniority-wise), and (other things being equal) would have become the chief justice of India on the retirement of Chief Justice Ray on 28 January 1977. Inexorably, when the time came, 'other things' were not considered equal (by the government of the day). Khanna was 'superseded'. Justice M. H. Beg (No. 3) was appointed the chief justrice of India. Khanna resigned – but in a blaze of glory! It is for good reason that Khanna's portrait (though not a very good likeness of him) hangs in the court where he sat – Court No. 2.

Jean Monet, father of the European Union, once said that the world is divided into two types of people – 'those who want to *be* somebody and those who want to *do* something'. Khanna is remembered, and will always be remembered, long after many chief justices of India are forgotten, because he 'did' something for which he deserved to be remembered.

One of the lessons of the Internal Emergency (of June 1975) was not to rely on constitutional functionaries. These functionaries failed us – ministers of government, members of Parliament, judges of the Supreme Court, even the president of India. It was because the president of India so readily agreed to sign the Proclamation of Emergency on the night of 25 June 1975, even before the cabinet (council of ministers) knew anything

about it, that three years later (after the revocation of Emergency in March 1977) a constitutional amendment was deliberately enacted by the Constitution (Forty-fourth Amendment) Act, 1978. Article 352 (3) declared that a president could not sign a Proclamation of Emergency unless the decision of the council of ministers was communicated to him in writing! I have always thought that Article 352 (3), as amended on 20 June 1979, was an avowed expression of parliamentary distrust of India's highest functionary – the president.

In retrospect (but only in retrospect), during the (Internal) Emergency of 25 June 1975, even the unfortunate majority decision in the *ADM Jabalpur* case of April 1976 was (in the long run) not a bad thing. It stimulated in right-thinking people the realization that you could not save freedoms by merely relying on the Constitution, and expecting constitutional functionaries to perform their allotted tasks. There had to be a public feeling, an upsurge, about cherished rights not merely because they were enshrined in the fundamental rights chapter of the Constitution, but because they were believed in by right-thinking citizens as basic to civilized existence.

I believe that the June 1975 Emergency was an inoculation against future impositions. It helped instil in people – responsible people like elected representatives in Parliament – greater respect for the rule of law. By a constitutional amendment enacted with effect from June 1979 – Constitution (Fourty-fourth Amendment) Act, 1978 – Parliament (in its constituent capacity) declared that Article 20 (double jeopardy) and Article 21 (right to life and liberty) could never be suspended even during times of war, or during a period of an Emergency (External or Internal) declared under Article 352. Then again, for the inadequate existing constitutional provisions relating to revocation of an Emergency (which could only be revoked by the president, i.e., the central government), there was added an important additional safeguard. By the same constitutional amendment (the fourty-fourth amendment): (i) Parliament was endowed with overriding power to revoke an Emergency declared by the executive under Article 352 whenever, according to a majority of members of Parliament, conditions for its invocation no longer existed; (ii) an Emergency declared under Article 352 had to be approved within a stated time by a two-thirds majority in Parliament, and if Parliament was not in session it had to be summoned and assembled for this specific purpose; and (iii) the finality clause and non-

justiciability clause in Article 352 (5) (which had been inserted by the Thirty-Eighth Constitution Amendment, 1975, w.e.f. 1 August 1975), was expressly deleted.

But a written constitution safeguarding the rights of citizens does not add up to very much – they are just words. When the historian, Edward Gibbon, completed the first volume of his classic, *The Decline and Fall of the Roman Empire*,[9] he was permitted to present it to the Duke of Gloucester, brother of King George III. He was well received. When, a few years later, he presented the second volume of almost equal length, the prince received the author with considerable affability, saying to him, as he laid the heavy volume on the table, 'Another damned, thick, square book! Always scribble, scribble, scribble! Eh! Mr Gibbon?' Not only academicians and politicians but a good many 'intellectuals' around the world have harboured similar sentiments about the proliferation of documentation in the area of human rights – declarations, conventions, resolutions, treaties … Words, words, words … The United Nations (UN) is long on instruments relating to human rights (they say), but its member states are significantly short on performance. Universalization of human rights may well have been achieved, but only on paper. Effective implementation is lacking. There is much truth in this criticism. Sovereign nation states often impede the quest for universalization. What governments profess (around the world) and what they practise (within the state) hardly ever coincides. The most important single factor in the implementation of human rights is not documentation, but the spirit of the people.

* * *

After I resigned as ASG, I did not go back to Bombay. I continued my private practice in the Supreme Court of India.

We had to vacate the government bungalow at 7, Safdarjung Lane. Resignation from government may have been heroic in retrospect – but in Delhi people go the way the wind blows; and resignation made us unpopular during the Emergency. Owners were reluctant to let out their houses. Ultimately, after Bapsi spent several weeks looking around for a place –assisted by my erstwhile junior Ashok Pratap who was practising in Bombay but came over to Delhi specially to help Bapsi in her efforts – we

shifted to 21, Hauz Khas Enclave, in August 1975. We have since then spent many, many happy years in this home. The house then belonged to the sister of the late Patwant Singh (a famous, distinguished author and trenchant critic of most governments and of their policies). He and his sister, Rasil Basu, were most gracious. Not only did they let the ground floor to us (we later purchased the entire bungalow) but as to what rent we should pay, all that Patwant would say is, 'Pay what you like.' They were thrilled that I had laid down office the day after the imposition of the Internal Emergency. I must say that very few people reacted in that way. One of them who did was the secretary of law in the Delhi Government, Rajni Kant. My wife and I (and our children) will always fondly remember this stalwart and his dear wife and children. Despite the fact that he was in the government, Rajni Kant would come and visit us almost every day, which was most refreshing particularly because even one-time 'friends' were reluctant to do so; they feared that their car number would be noted and reported back to 1, Safdarjung Lane (Prime Minister Indira Gandhi's official residence). Loyalties in the capital city are most ephemeral!

Notes and References

1. An eminent advocate and respected friend; he was the union law minister in the Janata Government headed by Prime Minister Morarji Desai, which came to power after the Congress Party, led by Indira Gandhi, had been defeated in the March 1977 general elections.

2. Prior States of Emergency were the proclamation of 26 October 1962 (revoked on 10 January 1968) and the proclamation of 3 December 1971 (external aggression on account of the Indo-Pak War).

3. Lord Acton expressed this opinion in a letter to Bishop Creighton in the year 1887. Another English politician, William Pitt the Elder, The Earl of Chatham and British prime minister from 1766 to 1778, is sometimes wrongly attributed as the source of this quote. He did say something similar, in a speech to the UK House

of Lords in 1770, ‘Unlimited power is apt to corrupt the minds of those who possess it.’

4. AIR (All India Reporter) 1976 S.C. 1207 (judgment dated 28 April 1976)

5. *The Indian Judiciary – A tribute* (1997), Poornima Advani, HarperCollins Publishers, India, p. 127.

6. It was directly as a result of the dissent in this case that Justice Khanna was subsequently ‘superseded’ in January 1977 when it was his turn (as seniormost judge) to be appointed chief justice of India. Contrary to long standing practice, he was not appointed chief justice of India. Khanna then promptly resigned.

7. *Six Men* (1977), Alistair Cooke, Alfred A. Knopf, New York, p. 82.

8. ‘Strength to Love’, Martin Luther King Jr, 1963.

9. *The Decline and Fall of the Roman Empire* (1994; in 3 volumes), Edward Gibbon, Modern Library, Random House, New York.

Chapter 9

Some Reflections – Post-Emergency

Indira Gandhi ... had expressed shock and surprise at the total lack of resistance amongst the people to the Emergency. She particularly mentioned ... that she was more amazed at the lack of reaction amongst the intelligentsia! When times are bad, this category – the intelligentsia – is the most despicable in all countries. It is the intelligentsia that has both the capacity and the inclination to rationalize tyranny. And so it was in India.

During the post-Emergency period when the Janata Government came to power, L. K. Advani was the minister of information and broadcasting. He telephoned and asked me to be a member of the Second Press Commission which the new government intended to set up under the chairmanship of Justice P. K. Goswami. I had known Advani, who as secretary of the Bharatiya Jana Sangh Party (known simply as the Jana Sangh) appeared opposite me before a special bench of seven judges that sat during the summer vacation of 1974 to decide important constitutional questions raised in a Presidential Reference.[1] Under our Constitution, the president is elected by members of an electoral college consisting of elected members of both houses of Parliament and legislative assemblies of states – and every elected member of a legislative assembly of a state is to have (in the electoral college) 'as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the state by the total number of the elected members of the assembly' (Article 55). Article 56(1) provides that the president shall hold office for a term of five years from the date on which he enters upon his office, and under Article 62(1) an election to fill a vacancy caused by the expiration of the term of office of president 'shall be completed before the expiration of the term'. The incumbent president, V. V. Giri, was to lay down his office in August 1974 and a new president would have to be elected before 24 August 1974. But the electoral college was not complete since the legislative assembly of the state of Gujarat had been dissolved in March 1974 and elections to a fresh legislative assembly for Gujarat could only be held after the delimitation of constituencies had taken place under the Delimitation Act. The Bhartiya Jana Sangh Party insisted that the presidential election could not be held until elections to a fresh Gujarat State Legislative Assembly had taken

place; hence the Presidential Reference. The seven-judge bench answered the reference by holding that only such persons who were elected members of both houses of Parliament and the legislative assemblies of the states on the date of the election to fill the vacancy caused by the expiration of the term of office of the president would be entitled to cast their votes in the electoral college. The court also held that the election to the office of president must be held before the expiration of the term of office of the president notwithstanding the fact that at the time of such election the legislative assembly of the state had stood dissolved. As secretary of his party, L. K. Advani argued the Presidential Reference like a seasoned lawyer – and I complimented him on his performance in open court.

The Second Press Commission got off to a good start with Justice P. K. Goswami as chairman.[2] We members toured large parts of the country, recording the evidence of various individuals, bodies and experts, and listening to their views. This was when my wife (who accompanied us on some of our trips including one to the Andaman and Nicobar Islands) and I came to know intimately Justice Goswami. I remember that in the evenings when it was time to relax, Justice Goswami would always say, 'Now, as to what we should do this evening we must ask Mrs Nariman and do exactly what she says!'

We worked hard as members of the commission, and when our findings were ready (we were in the final stages of the preparation of our report), general elections were called in September 1979. The Janata Party which came into power (in March 1977) after the lifting of the Internal Emergency now went out of power in an anti-incumbency wave. Indira Gandhi came back as India's prime minister in January 1980. She then wrote to Justice Goswami a polite note thanking him and all other members for the efforts they had taken, but said that there was no need now for any report! The Second Press Commission went out not with a bang but a whimper. Within a few months thereafter, a new Press Commission was set up by the Congress government, also called the Second Press Commission with Justice K. K. Mathew as its chairman. And in due course the Mathew Report was published. The unfinished Press Commission of Justice Goswami does not figure even as a footnote in the official report of the Second Press Commission! It was confined to the dustbin of history.

P. K. Goswami was an invariably predictable judge. Whenever I appeared before him in the Supreme Court in special leave petitions, I could always

foretell the result! Besides, he was a judge with a great, almost overpowering sense of integrity. And thereby hangs a tale. In the elections held in March 1977, the Janata Party had secured an overwhelming majority in the Lok Sabha. In the states, however, the Congress Party was continuing in office. Considering the complete rejection of the Congress Party at the centre in April 1977, the then union home minister addressed letters to the states of Bihar, Uttar Pradesh, Himachal Pradesh, Haryana, Madhya Pradesh, Orissa, Punjab, Rajasthan and West Bengal, asking them to advise their respective governors to dissolve the assemblies and seek a fresh mandate from the people. On 22 April, in a radio interview, the union law minister said that, 'A clear case has been made out for the dissolution of the Assemblies in the nine Congress-ruled states and holding of fresh elections.'

In April, the states of Rajasthan, Madhya Pradesh, Punjab, Bihar, Himachal Pradesh and Orissa filed suits in the Supreme Court (under its original jurisdiction conferred by Article 131 of the Constitution), praying for a declaration that the letter of the home minister was illegal and ultra vires the Constitution, and not binding on the plaintiffs. Preliminary objections were raised on behalf of the defendant, Union of India, against the maintainability of the suits under Article 131. The suits were heard, and orders upholding the preliminary objections and dismissing the suits were passed on 29 April 1977. Reasons for the decision were handed down by the justices later – on 6 May 1977.[3] During the confabulations amongst the justices (to discuss the giving of reasons for their decision) it was revealed that the then acting president, B. D. Jatti, had visited the chief justice of India (M. H. Beg) sometime after 29 April when the arguments in the case had closed. This visit was to invite the chief justice to a reception on the occasion of the wedding of the acting president's son. But it appears that the acting president, Jatti, did not miss the opportunity to mention to the chief justice that the reasons for the court's decision should be announced well before the private celebration to be hosted by him. Justice P. K. Goswami was shocked by this revelation, and this is what he wrote in the last paragraph of his judgment in the case:

> 178. 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. I have given this revelation the most anxious thought and even the strongest judicial restraint which a Judge would prefer to exercise, leaves me no option but to place this on record hoping that the majesty of the High Office of the President, who should be beyond the high-watermark of any controversy, suffers not in future.

It was known that Chief Justice M. H. Beg was very close to Prime Minister Indira Gandhi, and that he was appointed chief justice though he was not the seniormost judge (the seniormost was Justice H. R. Khanna who was superseded, and who then resigned). It was in this background that Justice Goswami put on record his views 'with a cold shudder'. It was beyond his comprehension and sense of values that the country's highest constitutional functionary would attempt to influence the timing of a decision of the country's highest court.[4]

* * *

When you look back – as I do – at various stages of your life, whether professional or otherwise, you will invariably find that there is someone who has quite gratuitously, without expecting anything at all in return, helped you along the way. I have had the experience on several occasions, and can name all the people who have, without much active effort, helped me along life's path. It is as if you are climbing a steep hill; you slip on some cobblestones, and someone (out of the blue) offers you a hand. And you take it.

A year after I resigned as additional solicitor general, and when I was in private practice, Niall McDermott, who was the secretary general of the International Commission of Jurists (ICJ) in Geneva at that time, came to India especially to meet me. He came on the suggestion of a mutual friend, Advocate R. N. Trivedi, who knew him well.

Niall McDermott talked to me and later asked me to become a member of the ICJ. I accepted and was duly elected, and served as a member of the ICJ for many, many years. After the Constitution of the ICJ was revised, I continued to serve for a fresh term of 15 years from 1982, ultimately being elected chairman of its executive committee (1995–1997).[5]

As chairman of the executive committee, I headed an ICJ mission to investigate and examine the implementation of the death penalty in the United States of America. Other members of the commission were: Justice Lennart Groll (retired judge of the Stockholm Court of Appeals and an ICJ vice-president), Justice Kayode Eso (retired justice of the Supreme Court of Nigeria) and Sigrid Higgins (executive secretary of the ICJ who was a lawyer from Australia). With a view to gathering first-hand information concerning the practices and procedures of capital punishment sentencing, as it actually operates in the United States, we the members of the mission visited Washington DC and the states of Pennsylvania, Georgia and Texas during the second half of January 1996, and personally conducted inquiries at both state and federal levels. The ICJ report was published in June 1996 under the heading 'Administration of the Death Penalty in the United States'.
The thrust of this report was:

> *that without* prosecutorial discretion being controlled and channelled;
> *that without* the system of jury-selection and jury-determination being freed of racial and class bias;
> *that without* meaningful and adequate means of legal representation being ensured to those indicated for capital crimes; and *that without* opportunity being provided through judicial processes to withstand the impact of effect-based racial discrimination, the administration of the death penalty in the United States was, and would remain, arbitrary and racially discriminatory, and prospects of a fair hearing for capital offenders could not (and would not) be assured.

In 1991, I was elected president of the Bar Association of India (BAI), and have continued since then. The achievements of the BAI could have never been accomplished without the unstinted support, help and initiative of that master–organizer of our time, my good friend Lalit Bhasin, aided by my successor in office, Associate President Anil B. Divan, and helped by an indefatigable team of vice-presidents (R. K. P. Shankardass, Soli J. Sorabjee, K. K. Venugopal, Ashok H. Desai, P. P. Rao, V. R. Reddy and Dipankar P. Gupta, K. N. Bhat and Surendra G. Desai) and all other members of the executive committee of the BAI. Lalit Bhasin, who has

been the secretary-general ever since the early 1990s, has contributed immensely to the growth and success of our organization.

In 1995, I was appointed a council member of the Human Rights Institute of the International Bar Association (IBA), and elected co-chair of the institute for two successive terms from 2001 to December 2004. At the 2001 Annual IBA Conference in Cancun, Mexico, the IBA leadership supported a request to create an IBA Task Force on International Terrorism with Judge Richard Goldstone as its head.[6] I was named as one of its members. The report by International Bar Association's Task Force on International Terrorism has been published and widely distributed (by Transnational Publishers, Ardsley, New York).

Fali Nariman with President A. P. J. Abdul Kalam at the release of the IBA Report on Terrorism (2003)

And with all these new responsibilities came another turning point in my career: recognition – national and international. These are the hidden rewards for spot decisions taken, such as resignation from high office as a mark of protest. They are courageous, but only in hindsight. You don't know whether such decisions are right or wrong at the time of taking them. But sometimes, providentially, when they turn out to be the 'right' ones, you become a hero.

An instance of courage by hindsight that I now recall was when a bench of the Delhi High Court consisting of Justice S. I. Rangarajan and Justice R. N. Aggarwal allowed the habeas corpus petition of the eminent journalist and writer, Kuldip Nayar, who was then working for *The Indian Express*.

Kuldip had been detained under the MISA during the dark days of the Internal Emergency of June 1975. For his brave act of allowing Kuldip's petition for habeas corpus (to produce the body and free him), Justice Rangarajan was 'punished' by being transferred to the High Court of Assam, where he became popular instantly. The Constitution provides for the transfer of a high court judge by the president – a euphemism for the Union of India; Article 222 – even without the judge's consent – on the recommendation of the CJI, and since the CJI had recommended the transfer, Rangarajan could not complain. And he did not complain. He had a philosophical outlook to life. He went to Assam like a good soldier, and became the most-respected chief justice in the High Court at Gauhati (now spelt Guwahati), exercising jurisdiction over the seven states of the north-east.[7] I was dismayed at Rangarajan's transfer and even more dismayed that he did not make it later to the Supreme Court when other 'transferred judges' did.

Some of the judges of the Delhi High Court at the time (who shall be nameless) had started a whispering campaign against the brave Justice Rangarajan; he was not rewarded (as were other 'judicial victims' of the Internal Emergency) with a judgeship of the Supreme Court after the general elections of March 1977. Much, much later at a function of the Bar Association of India (held on 12 September 2006), the then chief justice of India, Y. K. Sabharwal, mentioned something I did not know about the other judge – Justice Aggarwal (Sabharwal had been an advocate of standing in the Delhi High Court at the time). Sabharwal said that Justice Aggarwal (who had been a district judge and was appointed additional judge of the Delhi High Court, and had participated in the decision of the bench presided over by Justice Rangarajan in releasing Kuldip Nayar) was also 'punished' – his term as additional judge of the high court was not extended; and he would have to revert as district judge, Delhi! In exasperation, Aggarwal asked all his colleagues on the bench what he should do. Should he resign or should he go back as district judge? Some of his colleagues said he must resign while others said the opposite. And then, in Sabharwal's words:

> … it is to the credit of Justice T. P. S. Chawla (of the Delhi High Court), whom I always greatly admired and who, alone amongst all the judges, not only drafted a joint letter of resignation (on behalf of all

> judges of the Delhi High Court) to be addressed to the government of the day but Justice Chawla also signed it, along with one or two other judges and told all his colleagues that it was no use giving advice if you were not going to act on it. (Chawla said) 'If all of us in unison resign then even in an Emergency it will be difficult for the government of the day to accept our resignations. If all of you sign this paper which I have just signed, the advice to Aggarwal that he should resign will be the correct advice.'

However, only two or three other colleagues of Chawla agreed to sign the joint letter of resignation. The rest did not.

As a consequence, Aggarwal's mind was made up. He went back as district judge. The Emergency, thank God, did not last too long. A couple of years later (after the Emergency was revoked), Aggarwal was once again promoted permanently as a high court judge. He retired as the chief justice of the Delhi High Court ('God pays,' as Palkhivala used to say, 'but not every week!').

Justices Chinnappa Reddy and A. P. Sen (both 'transferred' judges), during the Emergency of June 1975, were elevated to the Supreme Court (when the Janata government came to power in March 1977) but not Justice Rangarajan, which to me was most disappointing. But Rangarajan never bothered. He started practising as a senior advocate in the Supreme Court after his retirement as chief justice of the north-eastern states. He reminds me of Chief Justice V. S. Malimath of Karnataka (and later of Kerala) whom I greatly admire and respect. When judges junior to him (Justice E. S. Venkataramiah and then Justice M. N. Venkatachaliah) were appointed judges of the Supreme Court, and went on to become successful chief justices of India, Justice V. S. Malimath was transported only to the Kerala High Court as chief justice! Yet Malimath never bore any grudge. He never turned green with envy. He did whatever task was entrusted to him by successive governments with distinction and with a smile – a model judge.

* * *

The greatest single fact of the Emergency was fear heightened by an absence of communication of credible news, and a proliferation of rumour-mongering. For us (Bapsi and myself) it also meant fewer friends. No one

except sincere and genuine well-wishers wanted to drop in or to be seen dropping in on us, either in Bombay or in Delhi. For some weeks, I was even fearful of the knock on the door at night, with the possibility of being detained with a trumped-up detention order. But I need not have worried. My resignation made no impact, not even ripples, in the political waters of the time. I was simply not important enough. Later on, I remember telling my wife, 'I wish, I sincerely wish, I was attorney general on 27 June, only for the reason that my resignation would then have had some effect.' The high commissioner of Australia, Bruce Grant (a non-career diplomat), who knew us and occasionally used to walk with us in the evenings in the Nehru Park, told me (not long after the imposition of the Emergency) that he had met Indira Gandhi a couple of weeks after 26 June, and she had expressed shock and surprise at the total lack of resistance amongst the people to the Emergency. She particularly mentioned to him that she was more amazed at the lack of reaction amongst the intelligentsia!

When times are bad, this category – the intelligentsia – is the most despicable in all countries. It is the intelligentsia that has both the capacity and the inclination to rationalize tyranny. And so it was in India.

A personal note about my resignation: my wife's father (Framroze Contractor) who was very fond of me (and I of him), felt proud of my appointment as additional solicitor general of India – he conveyed it to all and sundry. He was, therefore, the most disappointed when he heard that I had resigned the office. 'But why?' he would ask me; unconvinced by my answer. He was despondent that he could no longer tell his friends who his 'great' son-in-law was!

Shortly after I resigned, when I resumed private practice in the Supreme Court, colleagues braver than me would loudly condemn the Emergency. R. K. Garg was one stalwart who did so, and whom I will always remember. We were very fond of each other and respected one another, though we appeared on opposite sides. Another fearless and lovable person was Gobind Mukhoty. He would sit in the Supreme Court Bar library, roundly and loudly swearing at Chief Justice Ray, on the (mistaken) assumption that whatever was said in the Bar library did not constitute contempt! Others remained tight-lipped. They were not so sure. Besides, walls had ears.

C. K. Daphtary (CK) and S. T. Desai (ST) were distinguished contemporaries, very senior and both Gujarati-speaking. They always came in early to the Bar library, sat opposite each other, occasionally exchanging pleasantries. One morning, in August 1975, I was the sole witness to the following conversation:

> S. T. DESAI: (holding a cigarette between his third and fourth fingers, with loosely clenched fists, as was his habit, and occasionally inhaling) Chandubhai – *bolo* (Chandubhai – speak).
>
> C. K. DAPHTARY: (puffing away at his pipe; his eyes sparkling with mischief) Sunderlal – *tame pahle bolo* (Sunderlal – you speak first).

In those dark days of the Emergency when informers were around, you only spoke, within the hearing of others, when you *had to*! Unwittingly, these stalwarts of the Bar had encapsulated, in an innocent, spontaneous one-act play, the entire climate of the times!

A few more words about Chandubhai Daphtary: his mind was clear – remarkably clear – and his responses were instant, perhaps due to what he told us one day in the evening of his life. He had come for a drink at our home after a meeting of the Bar Association of India of which he was president, and reminisced about the days when he was only a school-going boy who had been sent for studies to England where he lived with his uncle. As a Gujarati from Bombay, he was brought up as a strict vegetarian. But on the first evening when he arrived at dinner (at his uncle's home in

London) he was given lamb cutlets – nothing else. Seeing meat, he said he did not feel hungry. His uncle said, 'In that case you may go up and get into bed.' The second day after walking to (and back from) school – again, at dinner, the only dish served was the same fare – lamb cutlets. Daphtary again said he did not feel like eating, and he was asked by his uncle to go up and retire for the night. On the third day he was so famished that when he came down for dinner, he ate up quickly and quietly all the cutlets that were served, and asked for more! Later (much later) when he was older, his uncle told him that he had done this on purpose – like a recalcitrant pony he was 'broken-in' at the start – because (his uncle said) he would have been miserable in the United Kingdom if he had remained what he was in India: 'a pure vegetarian'!

Later that evening, he also regaled us with another story of his life. He had come back from England after being called to the Bar. He had also done his tripos at Cambridge University (with Greek and Latin!) and stood first. His uncle was a well-known attorney in Bombay, a senior partner in the solicitor-firm of Daphtary Ferreira and Divan. He placed him in the chambers of the great J. D. Inverarity, the doyen of the Bar.[8] After a couple of weeks with him, the uncle went over to ask Inverarity how his nephew was doing. Inverarity took him outside his chamber to a spot where some workmen were digging up a bit of the lawn in the high court premises, and there was quite a lot of rubble. Then, pointing at this spot, Inverarity told Daphtary's uncle, 'I have been taking all this out of his head!' Daphtary learnt – early on – one of the lessons which he never forgot – unless you take out of your head a lot of the useless stuff that is in it, there will be no place for what needs to be there! I once asked him about Jinnah; Daphtary had been his junior and had worked in Jinnah's chamber. He told me that in his opinion, Jinnah was the best advocate of his time!

I have mentioned earlier how, in my experience, human memory plays truant. We sometimes forget inconvenient things and remember things that did not happen.

Well, for many years after the Internal Emergency was revoked in March 1977 – when elections were held, and the Congress Party, under the leadership of Indira Gandhi, was swept out of office – I harboured the recollection of someone (probably the then high commissioner for Australia) telling me that he had it first hand from Indira Gandhi saying that it was President Jimmy Carter who had persuaded her to go legitimate, and

call elections in March 1977. I mentioned this to all and sundry. I repeated this story at a luncheon meeting with the judges of the Supreme Court of the United States, at one of the functions of the INDOUS Legal Forum in Washington in 1995. Justice Ruth Ginsberg was extremely interested in this titbit of information, and asked me whether I could lay my hands on any authenticated document to support this recollection of mine. I then went back to India but drew a blank. Even the then leader of the opposition, L. K. Advani (who had been detained in jail during the Emergency), said that he had no recollection of any president of the United States prompting Indira Gandhi to hold elections in March 1977.

In times of need I rely on an old friend of mine (and of India's) who is a storehouse of information about those troubled times. I enquired from Granville Austin ('Red' Austin) in Washington, and he very kindly looked into the papers in the Library of Congress, but found nothing. I penned a letter of apology to Justice Ruth Ginsberg; it read:

> July 17, 1995
> Dear Justice Ginsburg,
>
> I have drawn a blank whenever I have attempted to get some written information of my President Carter story about lifting of the Emergency and holding of elections in India in March, 1977.
>
> Now I have checked with Mr L. K. Advani, Leader of the Opposition (who was detained during our phoney Emergency of June 1975): he says that he too has no recollection of any President of the U. S. prompting Mrs Gandhi to hold elections.
>
> Sorry, I misled you. My only excuse was one given by your distinguished countryman Mark Twain. He had written: 'The older one gets the more vivid the recollection of things that have not happened'.
>
> With apologies,
> Yours sincerely,

(Fali S. Nariman)

The judge had the courtesy to reply by a letter dated 25 July 1995, which read:

Supreme Court of the United States
Washington D.C. 20543

Chambers of
JUSTICE RUTH BADER GINSBURG
July 25, 1995
Senior Advocate Fali S. Nariman
F-21/22 Hauz Khas Enclave,
New Delhi – 110 016

Dear Mr Nariman,

Appreciation for your good letter of July 17, and for calling my attention to the wisdom of Mark Twain – a statement that captures my own experience at least as much as it does yours.

With highest regards,

Ruth Bader Ginsburg

So, there you see. We *do* sometimes recall things that have never happened (at least I do)!

* * *

I have already mentioned that with my resignation as additional solicitor general of India, there came another turning point in my career – international recognition: election as a member of the International Commission of Jurists, Geneva, and later, chairman of its executive committee. I was also appointed (in 1989) vice-chairman of the ICC (International Chamber of Commerce) Court of International Arbitration, Paris, for three years and reappointed for four successive terms till I voluntarily retired from the court in December 2005.

Fali Nariman at the ICC Court of International Arbitration, Paris
(where he was vice-president for over 15 years)

I was elected chairman of the International Council for Commercial Arbitration (ICCA) for a four-year term in 1994 and re-elected for another four-year term. We had meetings of the ICCA at several places around the world. At one of which – in Stockholm – I recall that Chief Justice Blum of the court of appeal (who was also president of the Stockholm Chamber of Commerce) entertained us all to a sumptuous dinner, and spoke a few words of welcome. As she sat down she looked at her watch, then turned to me and said, 'I finished in one and half minutes – don't you think it is the shortest speech you have ever heard?'

In my response I said, 'Much as I am reluctant to disappoint you, Chief Justice, the shortest after-dinner speech that I heard was when I was a boy of ten in Rangoon. It lasted just fifteen seconds and it was delivered by a not-so-distinguished politician of his time – U Saw, prime minister of

Burma in 1940.' The British had him shot after the war, not because he made a bad fifteen-second speech, but because he was found involved in the assassination of U Aung San, then prime minister of Burma (father of Aung San Sui Kyi).[9]

I then told her my story. It was at a Rotary Club dinner in Rangoon (my birth place) nearly 60 years ago (I was a boy of ten – not permitted to participate but only permitted to watch from behind the curtains). My father who was president of the Rangoon Rotary Club introduced the prime minister in a brief welcome speech. And the great man rose to respond. What he said took no time at all, 'Ladies and gentlemen, my secretary will sing a song!' The secretary, sitting at a distant table, was just downing his fifth drink when he heard the improbable summons. He rose, looked around, goggle-eyed, and did as he was told – he sang a Burmese song. It was terrible. Songs, badly sung, are like the peace of God – they 'passeth all understanding', and like his Mercy, endureth almost for ever!

* * *

The 16th ICCA Conference in London (2002) was organised by the Chartered Institute of Arbitrators. Since I was demitting office as ICCA President after two terms (of four years each), my wife and I had the honour of being invited to dinner at the Guild Hall by the lord chancellor, Lord Levine. All the men were attired in black tie and dinner jacket – what in the old days the British sahibs in India used to call '*Khana ka Kapda*' (literally, dining dress). In the United Kingdom, there is a tradition that when you are invited to the Guild Hall, the host and the chief guest enter only after all are seated for dinner. There were about 300 guests seated on this occasion. As was customary, the host (in this case, the lord chancellor) led his guests (my wife and I), and as we entered we were treated to (customary) acclamation – not by clapping of hands, but by stamping of feet on the wooden floor!

Dinners at the Guild Hall are accompanied by a liveried gentleman with a long mace who announced each of us (the speakers) in a booming voice – 'Pray silence for the Lord Chancellor' and then 'Pray silence for the President of ICCA'!

In my speech at the gala dinner that evening I said:

This has been a sumptuous dinner, and whenever I attend a sumptuous dinner I am reminded of Lord Denning. He was a great friend of India and visited us frequently. And the reason I remember him on this occasion is that Lord Denning always began an after-dinner speech with the reflection that a convivial dinner fulfilled three distinct pleasures:

(1) first, the pleasure of eating with nice people;
(2) next, the pleasure of drinking with nice people; and
(3) the third, the pleasure of sleeping *with* – complete peace of mind!

Remembering the witty things that other people have said is an occupational hazard to the occasional speaker.

You often forget the punchline: illustrated in a story (slightly apocryphal) concerning India's first prime minister: Pandit Nehru, who was a well-read, cultured statesman.

At a dinner one night hosted by him for his cabinet colleagues, he picked up the wishbone[10] on his plate and asked his ministers to tell him which great historical character it reminded them of.

None of them responded – 'You tell us Panditji, you tell us', they said. Breaking the wishbone in two, Panditji said: 'Bone-apart!'

One of the ministers present who hailed from the Punjab was delighted with this historical allusion and was determined to repeat it with some of his own cronies.

But then at a dinner specially arranged by the minister to exhibit his borrowed knowledge of history, he floundered with the punchline.

> Sure enough, as especially ordered, the piece of chicken containing the wishbone was on the minister's plate.
>
> Sure enough, he picked it up and asked his guests as to which great character of history it reminded them of.
>
> And sure enough his colleagues round the table all said: 'You tell us, Sardar Sahib, you tell us.'
>
> But the minister – breaking the wishbone in two said: 'Napoleon'.
>
> No one applauded – no one laughed. And the minister bitterly complained: 'When Panditji tells a story everyone enjoys it, when I tell a story no one applauds!'

* * *

As vice-president (1979–1985) and then as president (1985–1987) of LAWASIA, I got an opportunity to visit many parts of Asia, particularly the Philippines. Bapsi invariably accompanied me; on my travels I formed the distinct opinion that after-dinner speeches were invented purely as a matter of form, not as a form of entertainment. I actually saw a chairman at a jolly dinner meeting in Manila looking at his watch and then at me (the speaker for the evening), and say:

> Would you rather start now Mr Nariman or shall we let them enjoy themselves a little longer?

In the Philippines, after-dinner songs are much more entertaining than post-prandial speeches. Even sitting judges when called upon to speak, often break into a song, and it was said by bad-mouthed lawyers that the songs of some of the judges were better than their judgments! As a matter

of fact, in Manila, if you insist that you would only speak and not sing, the host and the audience take it rather badly!

It was in LAWASIA that Pat Downey, human rights commissioner in New Zealand, and I formed (for the first time) a human rights committee for the region. This committee formulated, with the assistance of Chief Justice Samarakoon of Sri Lanka and Chief Justice Chandrachud of India, the LAWASIA Principles on the Independence of the Judiciary (The Tokyo Principles).

As I have already mentioned, after I resigned as the additional solicitor general in June 1975, I continued in private practice in the Supreme Court. After about eight years, Chief Justice Y. V. Chandrachud (he was chief justice of India from 1978 to 1985) invited me sometime in the early 1980s to be a judge of the Supreme Court – a direct appointment from the Bar. I thanked him but respectfully declined. He told me that he himself, when in top practice at the Bombay Bar, had been persuaded by Chief Justice M. C. Chagla to come on the bench and had 'made the sacrifice', and that he lived never to regret it. He said he was making me the offer not only after consulting all the judges of Supreme Court but at their instance, and that if I accepted I would in course of time (I was then only 53 years old) surely be chief justice of India for a very long period. Have I any regrets? I don't think so. I had then consoled myself with the reflection that my great mentor, Sir Jamshedji Kanga, who was 'elevated' and sat as an additional judge of the Bombay High Court from 1921 to 1923, was definitely not the most popular judge in his time. Patience with counsel droning on before him was not his forte! I comforted myself with the reflection that I too would not have made a good judge.

Notes and References

1. The decision is reported in 1974 (2) SCC 33 in re: Presidential Poll.

2. Other members of the Press Commission set up by the Janata Government were (apart from me) Abu Abraham, Prem Bhatia, S. N. Divedi, Moinuddin Haris, Professor Ravi J. Mathai, Y. N.

Mehta, V. K. Narasimhan, S. H. Vatsyayan, Arun Shourie and Nikil Chakravarty.

3. *State of Rajasthan vs Union of India*, 1977 (3) SCC 592 (bench of seven justices)

4. The chief justice of India, on seeing the statement of the reasons of Justice Goswami for the first time after the delivery of his judgment, said that the observations of Justice Goswami were based on a wrong impression. In the press statement of Chief Justice Beg it was stated that 'as the Chief Justice was an invitee with his wife, to attend the reception on Saturday, the 7 May 1977, and he was likely to meet the acting president and ministers of the Union Government at the function in connection with the wedding of the son of the acting president, he (i.e., the acting president) wanted the reasons for the judgment delivered before that.' In the press statement it was stated that it was in that connection that the chief justice had mentioned both the president's visit to him and 'the anxiety of everybody in the country' for the court's reasons. He (the chief justice of India) did not say at all that the acting president wanted to see these reasons: 'It is very regrettable that Mr Justice Gowsami should have misunderstood the chief justice who was only anxious that the reasons should be delivered before the court closes so that the judges are not placed in any embarrassing situation during the vacation.' (The entire press statement is reproduced in 1977 (3) SCC as a footnote to the case at p. 697)

5. Member, International Commission of Jurists (since 1982) and of its executive committee (1987); chairman of its executive committee (from 1995 to December 1997); and elected honorary member of the ICJ (since 1 January 1998).

6. Members of the IBA Task Force on International Terrorism were Ambassador Emilio Cardenas, president of the IBA and Argentina's former permanent representative to the United Nations; Professor Badria Al-Awadhi, professor of international law at Kuwait University; Professor M. Cherif Bassiouni,

president of the International Human Rights Law Institute at DePaul University, Chicago; Sten Heckscher, national police commissioner for Sweden; Baroness Helena Kennedy QC; Fali S. Nariman, president, Bar Association of India; and Professor W. Michael Reisman, professor of international law at Yale University.

7. Assam, Manipur, Nagaland, Meghalaya, Mizoram, Tripura and Arunchal Pradesh

8. John Duncan Inverarity, who practised in Bombay for 53 years (from 1870 to 1923), almost without a break was in Vachha's opinion 'the greatest, ablest and most powerful advocate that ever practiced in the High Court of Bombay'. In his reminiscences, Inverarity remarked that every one of his European contemporaries at the Bar rose to be either advocate general or judge or both – except himself. Though firm and fearless, he was never offensive or insolent to the court. Nor was he rude or arrogant towards the most junior opponent. He was never showy, shallow, confused, angry or blustering in his manner. It was a common sight to see him draw a pleading from a voluminous brief, while plunged in the midst of a case. He would go on writing out the plaint or the written statement in his own small clear hand without a scratch, and then while everybody thought that he was absorbed in his drafting, he would suddenly jump up and object to an improper question put to a witness, and as soon as the opponent sat down, he commenced cross-examining the witness, as if he had concentrated his mind all the while upon hearing the evidence. (*Famous Judge, Lawyers and Cases of Bombay*, p. 139–142).

9. U Saw (in Burmese, 'U' is honorific), 1900–1948, was a leading Burmese politician and prime minister during the colonial era before the Second World War. He was however best known for his role in the assassination of Burma's national hero, Aung San, and other independence leaders in July 1947, only months before Burma gained independence from Britain in January 1948. It was

on 19 July 1947 that a gang of armed paramilitaries broke into the secretariat building in downtown Rangoon during a meeting of the executive council (the shadow government established by the British in preparation for the transfer of power) and assassinated Aung San and six of his cabinet ministers; a cabinet secretary and a bodyguard were also killed. The evidence clearly implicated U Saw, who was tried, condemned and sentenced to death. He was executed at Insein Jail on 8 May 1948.

10. The wishbone, known in anatomy as the furcula, is a fused clavicle bone, found in chickens and birds, which is shaped like the letter Y – the clavicle bone is a lucky-charm.

Chapter 10

The Bhopal Case

The Moving Finger writes; and having writ,
Moves on: nor all thy Piety nor Wit,
Shall lure it back to cancel half a Line
Nor all thy Tears wash out a Word of it.

Edward FitzGerald's translation of
The Rubaiyat of Omar Khayyam

*I*n life there are no unmixed blessings. With 'international recognition' there also came international criticism for my assuming the role of lead advocate for Union Carbide Corporation (UCC) in the civil litigation arising out of the Bhopal gas tragedy.

The gas leak tragedy occurred in the factory of UCC's Indian subsidiary in Bhopal in December 1984. I was engaged at the end of 1985 as lead senior advocate and appeared (with my able junior and chambermate, Bomi Zaiwalla) for UCC in the civil litigation:

First, in the District Court in Bhopal in the suit filed by the Union of India on behalf of all the claimants pursuant to the provisions of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. This led to an interim order dated 17 December 1987, being passed for payment of compensation, without the documents on each side being disclosed or any evidence being led by either of the parties. The Bhopal District Judge (M. W. Deo) summarily ordered Union Carbide Corporation to pay to the Union of India Rs. 3,500 million (Rs. 350 crores) as interim compensation.

Next, in the High Court of Madhya Pradesh in Jabalpur, where the interim order was challenged. It was modified by the judgment and order dated 4 April 1988 of Justice S. K. Sheth. Interim compensation was reduced to Rs. 2,500 million (Rs. 250 crores) on the basis of a legal principle.

Finally, in the Supreme Court of India where the order of Justice Sheth was challenged. After argument on both sides for over three weeks, a Constitution Bench of the Supreme Court pressed the parties to a settlement, which was ultimately arrived at with the then attorney general of India on 14/15 February 1989. UCC agreed to pay without admitting liability, a sum of US $470 million – in full and final settlement of all claims, civil and criminal – which was accepted by the Union of India, and

approved by the court. The sum of US $470 million was immediately brought into court[1] (its equivalent then in Indian rupees was Rs. 615 crores).

The settlement was later challenged by some NGOs (supported by the successor government to the Government of India that had signed the settlement terms) before another Constitution Bench of the Supreme Court. Again after considerable arguments on all sides, the validity and correctness of the civil settlement was upheld by the court, but the settlement regarding dropping of all criminal proceedings was set aside.[2] Both the settlement, as well as the judgments of the various courts led to considerable dissatisfaction amongst many NGOs. My taking the role of the lead advocate for UCC was criticized in an article written in the prestigious *Human Rights Tribune* in the Winter Issue of 1992, to which I responded in a detailed letter.[3] This letter gives a complete account of the civil case both in Bhopal and ultimately in the Supreme Court; it is therefore reproduced in full.

Many, many years later I was asked to write a piece on 'Twenty Years after the Bhopal Gas Tragedy', and it was published in the prestigious Indian journal, *Seminar* (in its issue of December 2004). There were, at that time as well, critical comments by a distinguished legal academic, as well as by two other persons which were published in the February 2005 issue of the journal. Before they were published, I was given an opportunity by the editors to respond. I did so in a communication dated 17 January 2005, which was also reproduced in the same issue.

I have felt that all these comments, criticisms and responses must find a place in the story of my professional life – for two reasons: first, because (as the poet says):

> The Moving Finger writes; and having writ,
> Moves on: nor all thy Piety nor Wit,
> Shall lure it back to cancel half a Line
> Nor all thy Tears wash out a Word of it.[4]

And second (and more importantly) on the principle contained in the quote attributed to Oliver Cromwell who had commissioned his portrait to be painted by a leading artist of the time:

> Mr Lely, I desire you would use all your skill to paint my picture truly like me, and not flatter me at all; but remark all these roughnesses, pimples, warts, and everything as you see me, otherwise I will never pay a farthing for it.
>
> (Remark, *Walpole's Anecdotes of Painting*, ch. 12)[5]

The pieces are arranged as they appeared in the foreign journal, *Human Rights Tribune*, in 1992, and in the Indian journal, *Seminar*, in December 2004/February 2005. They contain an adequate account of the civil case for compensation in Indian courts. I would be indulging in what we lawyers call 'special pleading' if I added anything to what was published in these journals.

(1) *Tribune des Droits Humains* – Winter 1992 (January–March)
Page 4–5, 'Fallen Angels?'

By Pauline Comeau
They were once human rights activists. Now, no one is really sure.

[Names and criticism of lawyers other than me (Fali S. Nariman) have been intentionally omitted – only extracts pertaining to me are quoted.]

… Highly respected Indian lawyer and human rights activist Fali Nariman, accepted the job as lead counsel for Union Carbide in the case against the Indian government over the 1984 Bhopal incident in which 2,500 people died (according to government figures) and almost 200,000 were disabled. The case was characterized by endless delaying tactics introduced by the company, and ended with what many described as an inadequate $470 million settlement.

Nariman continues to serve as an executive committee member of the ICJ.

Examples such as Nariman and (name omitted) are troublesome,

some say, because they continue to be players in both worlds.

When asked, these activists argue that they have done nothing wrong in taking up their new positions. Friends say Nariman argues that lawyers have the right to represent any client, a view shared by another ICJ executive: 'It's not like he is doing anything evil.'

Others disagree, human rights activists have a degree of credibility bestowed on them once they are recognized as part of the human rights community, says Dias (Clarence Dias). Such respectability comes with responsibilities and is a much sought-after commodity that must be guarded.

For example, Nariman's hiring allowed Union Carbide to cash in on the lawyer's human rights credentials. This in turn lent an aura of respectability to court proceedings and gave the impression that crass legal antics would not play a part in the outcome. In fact, repeated attempts to delay proceedings were key elements of Carbide's court-room strategy.

Dias says the human rights community should push for an international code of ethics that would govern the conduct of human rights lawyers as one way of responding to the issue …

(2) My reply:
April 24, 1992

Dear Mr Wiseberg,

A week ago, I received the first number of *Human Rights Tribune*. In the article 'Fallen Angels?' it is suggested that lawyers who are human rights activists should not accept briefs of those who 'violate' the human rights of others. This sounds heroic, but the suggestion is impractical and fraught with grave consequences: it puts an almost impossible burden on the lawyer, of pre-judging guilt; and (more important) it precludes the person

charged with infringing the human rights of another (such as one accused of murder) the right to be defended by a 'lawyer of his choice' – in my country, a guaranteed constitutional right. Even if a human rights lawyer were to take the risk of pre-judging guilt, how would he do it? By reading newspaper reports? By conducting a mini trial of his own? Judging guilt or innocence is a difficult business. The case arising out of the assassination of Mrs Indira Gandhi is an instance in point: three persons were accused of conspiracy to murder and put on trial; the public were convinced that they were as guilty as hell. 'Get on with it and hang the lot', was the popular outcry. Well, they got on with it. All three were convicted by the trial court and sentenced to death. The high court, after reappraising the evidence (in arguments extending over several weeks) upheld the convictions and sentence. But, on further appeal to the Supreme Court, the judges there found no evidence worth the name against one of the accused (Balbir Singh) – and he was acquitted! Would you have characterised your lawyer-cum-human-rights-activist as 'violator' if he had taken up Balbir Singh's case from the start? And would you have stuck to your condemnation even after the Supreme Court acquitted him? 'Tough issues', as you put it!

But it is not the comment on 'tough issues' that I write this letter. I respond because, whilst not averse to being criticised, I take great exception when my professional integrity is questioned.

The allegations in the article about the Carbide litigation in India, in which I was the lead counsel, are factually incorrect. The assertion that 'repeated attempts to delay proceedings were key elements of Carbide's court-room strategy', and the veiled suggestion that 'crass legal antics' played a part in the outcome of the case, are entirely contrary to the record. I do wish the facts had been checked with me, or even with someone else who was familiar with the case, before going to print.

The suit was filed by the Union of India representing all gas victims in the District Court of Bhopal in September 1986, and

UCC filed its written statement of defence two months later in December, 1986. Several interlocutory applications were thereafter filed by both parties. In November 1987, a judge of the High Court of Madhya Pradesh (exercising supervisory jurisdiction over the District Judge, Bhopal) issued (*suo moto*) notice to UCC to show cause why the suit should not be tried by the High Court of Madhya Pradesh itself 'to avoid any delaying tactics' by UCC. After considering the response of the UCC to this notice, a division bench (of two judges) of the same high court set aside the notice. In its judgment delivered on December 3, 1987, the high court observed: 'It would not be correct to say that the UCC has adopted delaying tactics and is preventing its trial. It does not appear that the UCC had taken any unnecessary adjournments or are obstructing the trial.' There was no appeal from this order by anyone, neither by the Union of India [nor] by any organisation representing gas victims in the suit.

Meanwhile, on December 17, 1987, District Judge Deo (who had, on April 2, 1987, proposed an award of interim compensation) passed an order directing UCC to deposit 3,500 million rupees as 'substantial interim compensation', without deciding liability. UCC approached the High Court of Madhya Pradesh in revision: the revision petition was admitted on February 1, 1988; and after an expedited final hearing, the High Court (on April 4, 1988) modified the order of District Judge Deo and passed a decree for 'interim damages' in the sum of 2,500 million rupees (approximately then equivalent to 197 million US Dollars). Appeals were filed by UCC and by the Union of India from this judgment of the High Court. Both appeals were admitted by the Supreme Court of India on September 8, 1988. UCC did not ask for any stay of the High Court order for 'interim damages', and the Union of India made no attempt to execute the order of the High Court though expressed to be executable as a decree.

Meanwhile, further hearing of the suit proceeded in Bhopal, but not before Judge Deo: the suit was transferred from his Court on the specific directions of the High Court since he had wrongly

prejudged the merits of the case and had thus not acted with 'strict judicial impartiality' (paras 53 and 55 of the order of the High Court dated October 13 1988). Repeated efforts were made to proceed with the trial, but even an order for mutual discovery of documents was resisted by the Union of India. More than a year and half after the suit was filed the Union of India stated to the Court, on an affidavit (filed in June 1988) that 'the stage of discovery has not yet reached'! The trial of suit could not therefore begin.

Meanwhile, hearing of the appeals before a Constitution Bench of the Supreme Court (the Pathak Bench) commenced in November, 1988; at repeated intervals during the course of oral arguments, the Court asked parties to settle the entire litigation. Ultimately, at the instance of the Court, the settlement order dated 14th/15th February, 1989 was passed. A sum of 470 million US Dollars (nearly two and half times of the amount of interim compensation ordered by the High Court) was brought into Court (within a week) in full and final settlement. The figure of 470 million US Dollars was, after negotiation, agreed to by the parties to the suit, and expressly approved by the Apex Court.

Review (and Writ) Petitions (for setting aside the settlement) were then filed which prevented the moneys becoming available for distribution even to genuine victims, whose names, categorisation and numbers had, by then, been ascertained and documented by agencies of the State and Central Governments. The petitions, filed by individuals and Gas Victim Organisations, were first heard by a Constitution Bench (the Mukherjea Bench) in April, July and upto August 10th 1990, when the Court reserved its judgment – before it could be delivered Chief Justice Mukherjea died, in September 1990. The Petitions had to be re-heard before a Constitution Bench presided over by Chief Justice Mishra; arguments went on for more than four weeks in November/December 1990, when judgment was reserved; it was delivered a year later, on October 3, 1991, the Bench upholding the settlement of the entire civil litigation. 470 million US Dollars

> with accumulated interest (aggregating by then to about 12,000 million rupees!) are lying with the Supreme Court (accumulating further interest of more than one hundred thousand rupees a day) still awaiting distribution. It is now more than two years since the moneys were first brought in.
>
> As to the role of Gas Victim Organisations (who had filed writ and review petitions) the Chief Justice had this to say (in his judgment dated October 3, 1991):

It may be right that some people challenging the settlement who have come before the Court are the real victims. I assume that they are innocent and unaware of this rigmarole of the legal process. They have been led into a situation without appreciating their own interest. This would not be the first instance where people with nothing at stake have traded in the misery of others.

In conclusion, permit me to mention that if I am a 'highly respected lawyer' (as generously acknowledged in the article) it is because of my record in the practice of the law for over forty years – the first of this period being spent in Bombay (in the High Court), and latter half in Delhi (in the Supreme Court) from May 1972, when I was appointed Additional Solicitor General of India. I resigned the day after the imposition of the (phoney) Emergency of June 1975, and have been in private practice since then. I was the only public official in the country to register my protest against the suppression of civil liberties by resigning office.

In your Editorial you have exhorted readers 'to send us letters …' I trust that, in fairness to me, you will publish this one.

Yours sincerely,

Fali S. Nariman

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Whether because of the reply reproduced above (which was published) or (what is more likely) because there were a host of other things that the human rights journal had to address in later issues, I came across no further criticism, except when 20 years later my friend S. Murlidhar[6] asked me if I would write in *Seminar* on the topic '20 years after the Bhopal Gas Tragedy …'; I agreed. This is what I wrote for the issue of December 2004.[7]

Some Reflections on the Bhopal Gas Tragedy
By Fali S. Nariman

I. Introduction

Twenty years after the Bhopal Gas Tragedy the arduous task of sifting the genuine from non-genuine claims is still not over. Some victims (and/or their heirs) have been paid. But more than Rs. 1,500 crores are accumulated in the Bank awaiting disbursal.

It was an imaginative and enlightened decision of a Bench of the Supreme Court of India,[8] prompted by a group of public-spirited advocates, that has helped to unlock the money-chest. In its order the Court said that it was satisfied that a direction was needed to be given to the Welfare Commissioner to disburse the amounts to persons whose claims have been settled – on a pro rata basis.

In this day and age of increasing public awareness of rights, and reluctance of statutory bodies and authorities to take prompt measures to enforce statutory provisions, it is up to the Judiciary to devise adequate remedies to prevent injustice. And it is in the field of remedies that equity must display the greatest inventiveness – providing relief in new situations as they arise.

II. A Landmark Judgment – of Justice Sheth

One such experiment in inventiveness was undertaken more than sixteen years ago in the Bhopal Gas Disaster case by a Judge of the High Court of Madhya Pradesh, Mr Justice Sheth. He delivered, what I now regard, as an invaluable, inventive judgment in the suit filed by the Government of India on behalf of all claimants (there were many thousands) who had suffered or had been injured as a result of the world's worst gas disaster. The GOI was entitled to do so by virtue of the provisions of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. The suit was filed by the GOI in the District Court of Bhopal. Very soon after the pleadings were completed the District Judge passed an order for interim relief against Union Carbide India Ltd. (a subsidiary of the multinational Union Carbide Corporation), assessed in the sum of Rs. 350 crores. This was an ad hoc sum by way of interim relief granted before any discovery and inspection, and well before the trial of the suit. The District Judge said that he was empowered to do so under Section 94(e) of the Code of Civil Procedure[9] and under Section 151 (the Court's inherent power).

The High Court on appeal said he was not so empowered. However wide the inherent powers of the Court they were related to the procedure to be followed by the Courts in deciding the cause before it: they were not powers that could override substantive rights.

In the *Bhopal* case, the action was one in tort where English principles applied, and even in England prior to express statutory provision enabling English Courts to award an interim sum as and by way of damages in an action for damages, there was no power to make any interim award of damages until the liability was ultimately established at the trial and the damages proved.

Whilst High Court of Madhya Pradesh (Mr Justice Sheth), set aside the reasoning of the District Judge who had relied on the doctrine of inherent powers, it held that the Court was not powerless because of want of a statutory provision to award interim damages in a suit for tort. The Judge traced this power not to the inherent powers of the court but to the common law, and he rationalised and upheld the ultimate order of the District Judge whilst disagreeing with his reasoning. He said that the law of tort was and is part of the common

law of India adopted and adapted from the common law of England. When adapting the common law, Indian Courts were enjoined to decide cases (including suits on torts) 'according to justice, equity and good-conscience': which had always been interpreted to mean 'the rules of English law as found applicable to Indian society and circumstances'. Relying on Section 9 of the Code of Civil Procedure, 1908[10] and supported by a 1975 judgment of the High Court of Madhya Pradesh,[11] Justice Sheth adapted (and applied) the statutory rules of English Law brought into force in the United Kingdom which enabled courts in England to grant interim compensation in a suit for damages for tort.

Holding the UCC prima facie liable, albeit vicariously, for the Bhopal Gas Leak Disaster – the judge directed its subsidiary, an Indian company, UCIL, being in charge of the plant, 'to make interim payment of damages' – which was assessed at Rs. 250 crores (two thousand five hundred million rupees).

This judgment was brought up in further appeal before the Supreme Court of India. It was heard for several weeks by a Constitution Bench of the Court – where ultimately it helped to trigger off an overall final civil settlement in the sum of US $470 million (about Rs. 3,000 crores). And after another tortuous round of litigation, this settlement of the civil case was ultimately approved.

The judgment of Justice Sheth constitutes the only precedent in India for grant of interim relief in a suit for damages for tort. It also underscores the need for judges to avoid literal and parochial approaches to interpret the law, when justice would be better served by bringing to bear larger humane sensitivities to their tasks. As the American philosopher Martha C. Nussbaum has said: 'Judges must educate not only their technical capacities but also their capacity for humanity.'

The judgment of Justice Sheth is significant also because:

First, it did not go against settled law about inherent powers viz., the inherent powers in the Code (powers which inhere in courts because they are courts) are governed in matters of procedure and do not enable its provisions to be invoked in the realm of substantive law.

Second, it followed the principle of equity that a right should not be without a remedy – the 'right' in this case was the right to claim interim compensation in a civil suit for damages – and it was rationalised on principles of common law, as adapted by Courts in India.

I was the lead counsel for UCC in the Supreme Court, and Justice Venkatachaliah who delivered the judgment of the Constitution Bench of 5 Judges (whilst approving the civil settlement)[12] correctly recorded (without approving) UCC's contention viz. 'that in a suit for damages where the basis for liability was disputed the court had no power to make an award of interim compensation'.

It is now more than fifteen years since that case was argued by me in the Supreme Court of India. I must confess that when I first read Justice Sheth's judgment, I was not at all impressed by the reasoning and attacked it with considerable force before the Constitution Bench of the Supreme Court. I had submitted that it was illogical. But as they say, wisdom comes (sometimes!) with age. Looking back, I find that the judgment does afford as good a rationale as any I can see, absent enacted law, for relieving hardship caused to litigants in a mass tort action – they have to wait for years in a three-tier system before they can establish and obtain a final executable decree for damages. In Megarry's *Second Miscellany-at–Law*, the author mentions that Lord Eldon spent twenty-five years as Lord Chancellor of England. When he was lawyer, as plain Mr Scott, he argued a case in the Chancery Courts and lost, and thirty-three years later the same case was cited to him, when now as Lord Eldon, he presided in the same Court of Chancery. He said that he remembered the case very well: 'And very angry I was with the decision; but have lived long enough to find out that one may be very angry and very wrong!'

III. No-Fault Liability

On the vexed question whether fault is an essential element in tortious liability, the law has moved in cycles. Medieval law, preoccupied with preserving peace, looked to causation, not fault. Gradually, however, the law in western countries (partially under the influence of the

Church) began to pay heed to exculpatory considerations. During the industrial revolution (in the late eighteenth and in the nineteenth centuries), there was a distinct tilt towards moral culpability as the proper basis for tort: to reap the benefits of the new machine age it was considered more politic to subordinate the security of individuals and not to burden the enterprise with the cost of inevitable accidents: a policy decision of courts. More recently, however, viewpoints appear to be changing drastically – more especially in the 'core area' of torts viz. industrial accidents – doubtless due to the realisation that modern technology, however safe, is not infallible, and the fact that victims of mishaps, more often that not, are unable to pin down the accident-producing activity to an ascertained fault.

The search is on for new rules of law which would require those engaged in particular activities, especially hazardous ones, to bear collectively the operative cost including the distribution of losses consequent as a result of carrying on such activities. Public policy, it is believed, would then be better served than under a legal system which leaves compensation for casualties to what has been described as 'a forensic lottery' based on notions of fault. Chernobyl and Bhopal are not just significant events: they are dreaded words in the vocabulary of all industrial nations, words that mean that, technologically, the unthinkable can happen.

In the realm of liability for industrial torts – fault or no-fault – we are harking back to medieval law: but only in theory. Assimilating the aspirations of what the law ideally should be, it is not beyond the realm of possibility to contemplate (and therefore to initiate) legislation for setting up a National Disaster Fund – such governments as are able and willing to raise resources could constitute such a fund even by executive order. The fund would, when established – either through governmental resources, voluntary contributions, and/or compulsory exactions by way of a levy on extrahazardous industries – help finance immediate and speedy relief to victims of human (manmade) disasters. The fund would make no distinction between injuries caused negligently or accidentally and would compensate victims according to a graded tariff, with a certain flexibility for individual needs and degree of loss and damage in particular cases; it would enable immediate partial payments to be made, to be followed

later by an award of additional compensation in lump sum or in the form of an annuity when the needs of the victim are better ascertained; the fund could have its own independent assessors and medical experts. The advantage of establishing such a fund, in anticipation and in the preparation for a toxic disaster, would be that by providing for immediate need of the victims, it would hedge against the time loss in seeking compensation through litigation under the existing tort system from parties ultimately liable for the accident. It would thus make adequate provision for a preponderant majority of victims of a mass disaster, enabling them to get quick relief cheaply; and yet would not foreclose the rights of those claiming larger damages through the tardy processes of litigation. The fact that there is such a fund would accelerate prospects of a quick settlement and offset the adverse effects of the threat of playing the trump card (of delay) held by every defendant whose liability is yet to be established in litigation. It would also help contain another unintended but inevitable consequence of a mass toxic tort.

IV. The Fall-out of Every Toxic Tort – The Toxicity of Anger

In toxic torts, the toxin or poison in the product which has killed or injured many, creates a violent emotional reaction in those affected – a condition biologically described as the 'toxicity of anger.'[13] The result of this is:

(1) A built-in inhibition to an early settlement of claims at a reasonable figure.

(2) Consequentially, a bitter, long drawn litigious contest.

(3) If, and when, the claims are ultimately settled, a residual gnawing resentment of a group of victims (often vocal and supported by 'do-gooders') that blood was not drawn: that liability was not fixed, that the wrongdoer was not identified and 'nailed'.

(4) Ultimately, when the case does reach the stage of adjudication – after several years – the result quite often is

a determination of liability not according to well-known principles of law but in accordance with individual notions of justice; for, as Cardozo said, the great tides and currents of tragic events which engulf the rest of men do not turn aside in their course and pass judges by.

(5) And, where, even at this stage no settlement is reached, there follows the tortuous process of assessing damages under the traditional well-defined individualistic heads of damage: viz. pain and suffering, loss of earnings, etc.

Sentiment is a poor guide to decision-making – but toxic torts do generate a great deal of it.

In toxic torts, anger against the industrial enterprise believed to be responsible is infectious, evoking strange responses. Affluent sections of society unaffected by the tragedy – who share the rage of the victims – themselves do nothing to alleviate the loss; they have heard people and the press repeatedly say that retribution must come from the wrongdoer: the industrial or chemical company must be compelled to pay. This results in a climate of opinion which favours the view that only victims of natural disasters require public help and support: as to others, the polluter (the perpetrator) should pay. It was this aspect that was particularly adverted to by the Supreme Court of India in the cases arising out of the Bhopal Gas Tragedy of December 1984. Whilst giving reasons, on 4 May 1989, as to what prompted the Court to accept the overall civil settlement reached in February 1989 between (on one hand) the Union of India (by statute, representing all claimants and appearing through its attorney general) and (on the other hand) the Union Carbide Corporation with its subsidiary Indian company – Chief Justice Pathak said:

> It is indeed a matter for national introspection that public response to this great tragedy which affected a large number of poor and helpless persons limited itself to the expression of understandable anger against the industrial enterprise but did not channel itself in any effort to put together a public-supported relief fund so that the victims were not left in distress, till the final

> decision in the litigation. It is well known that during the recent drought in Gujarat, the devoted efforts of public spirited persons mitigated, in great measure, the loss of cattle-wealth in the near famine conditions that prevailed.[14]

Absent statutory reform the essential thing in this 'poisonous' branch of the law is to take particular care that the toxin does not get into the legal system; when it does, it impedes negotiation, reduces the chances of a compromise, prolongs the agony of the victims; in turn, this agony gets reflected in the adjudicatory process, and, at times even in the ultimate adjudication. In this branch of the law, more than in any other, the judge, the mediating intervenor, lawyers on both sides – all the actors – are called upon to display rare skills of a high order: not all of them forensic. The lack of a coherent set of principles of applicable law, the want of essential tools to tackle the magnitude of the problems associated with toxic torts, are not in themselves sufficient reason for not pursuing legitimate claims nor sufficient reason why legitimate defences to such claims be not raised. But these gaps in toxic tort law do indicate the necessity for making Herculean efforts in at least three directions:

First: to ascertain promptly and accurately the victims – the number of dead, those injured, and the nature of their injuries;

Second: to a make a complete disclosure of this to the party sought to be made liable;

Third: to try and negotiate, without acrimony, an overall settlement – without reference to liability.

There is no other way – at least not until the slow, cumbersome, tortuous and highly expensive common-law tort system is reformed: by legislation. And it was legislation that was proposed by the Supreme Court of India in its later decision of December 22nd 1989.

V. Useful Recommendations of the Supreme Court whilst Upholding the Validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985: A Non-Starter

For the Bhopal Gas Tragedy not to be repeated, a series of recommendations were made by the Supreme Court of India when upholding the constitutional validity of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985. In *Charanlal Sahu vs Union of India*[15] the Constitution Bench of the Supreme Court in the background of the bitter experience arising from the Bhopal Disaster, set out in great detail what was required to be done by legislation and executive action. First, the Court said, the Central Government should lay down norms and standards that must be observed before permissions or licences are granted for running of industries which have dangerous potentiality: the Government should insist on the creation of a fund as a condition precedent for the grant of such licences or permissions: which would provide for payment of damages when an accident or a disaster occurred and ensure that the party agree to abide to pay such damages under a procedure which is not inordinately delayed. The Court then went on to suggest five separate measures that should be enacted by law. They are set out in the judgment, and are summarised below:

(1) The basis for damages in case of leakages and accident should be statutorily fixed taking into consideration the nature of damages inflicted, the consequences thereof and the ability and capacity of the parties to pay. Such law should also provide for deterrent or punitive damages, the basis for which should be formulated by an expert committee or by the government: 'This (the Court said) is vital for the future.'

(2) A law should be enacted to ensure immediate relief to victims – viz. by providing for the constitution of tribunals regulated by special procedure for determining compensation to victims of industrial disasters or accident, appeals against which may lie to the Supreme Court on limited questions of law, and only after depositing the amount determined by the tribunal.

(3) The law should also provide for interim relief to victims during the pendency of proceedings: these steps would minimise the misery and agony of victims of hazardous enterprises.

(4) The law should provide for the establishment of a statutory 'Industrial Disaster Fund', contributions to which may be made by the government and industries, whether they are of transnational corporations or domestic undertakings, public or private. The fund should be permanent in nature, so that the money is readily available for providing immediate effective relief to the victims. This would avoid delay in providing effective relief to the victims.

(5) 'The antiquated law', [*sic*] contained in the Fatal Accidents Act, 1855, should be drastically amended, or fresh legislation should be enacted which should, inter alia, contain appropriate provisions in regard to the following matters:

(i) The payment of a fixed minimum compensation on a 'no-fault liability' basis (as under the Motor Vehicles Act), pending final adjudication of the claim by a prescribed forum.
(ii) The creation of a special forum with specific power to grant interim relief in appropriate cases.
(iii) The evolution of a procedure to be followed by such forum which will be conducive to the expeditious determination of claims and avoid the high degree of formalism that attaches to proceeding in regular courts.
(iv) A provision requiring industries and concerns engaged in hazardous activities to take out compulsory insurance against third-party risks.

It is sad to record that save and except for a separate statutory provision requiring industries engaged in hazardous activities to take out compulsory insurance against third-party risks (Public Liability Insurance Act, 1991) not one – not a single one – of any of these

recommendations of the Supreme Court of India (made as far back in 1989) have been implemented so far; no steps whatever have been taken to implement any of these recommendations of the Court – and no one – not even spirited NGOs seem to be interested in lobbying for enactment of new laws as suggested by the Court.

In the 'Communications' sections of the February 2005 issue of *Seminar*, the editors published a critical communication from Professor Upendra Baxi, and another letter from Vijay K. Nagaraj and Nithya V. Raman seeking answers to various queries. Before publishing them the editors extended to me the courtesy of responding if I wished. Reproduced below are the communications and my responses along with answers to queries of Vijay K. Nagaraj and Nithya V. Raman.

An Open Letter to Fali Nariman
(from Professor Upendra Baxi)

I had to regretfully decline the invitation to contribute to the *Seminar* issue dedicated to the 20th Anniversary of the Bhopal catastrophe because of my resolution not to share any public platform with Fali Nariman ever since he assumed the UCC advocacy. I now make an exception because even some colleagues have read his contribution here as offering a veiled apology for his advocacy of an unjust cause and an unscrupulous client. No close reading of what he now says remains necessary to dispel this strangely erroneous impression. Instead, what we really get here is an elaborate apologia for the unconscionable settlement that he so assiduously actually promoted.

All that Mr Nariman actually says now in recalling the words of Lord Eldon (perhaps because of culture of the Anglophile Bar lacks utterly any serious postcolonial apologetic vocabulary!) that 'one has lived long enough to find out that one may be very angry and very wrong' (p. 27)! All that he now says is that he was 'very wrong' in opposing before the Supreme Court the direction for interim relief issued by the Madhya Pradesh High Court. He does not say that he was equally very wrong when he contested the High Court's ruling holding the UCC absolutely liable at law for causing this mass disaster or 'toxic tort'. In a contemporaneous article in *The Times of India* I

praised both these aspects; Mr Nariman only applauds now the worse half. Thus even now he reiterates the 'justice' of his conviction that he was indeed very wholly right in contesting any judicial upholding of the UCC legal liability; indeed he went so far as to finally induce the Supreme Court justices to settle the claim and subsequently fight tooth and nail our petition urging the court to review its 'settlement' orders and even all further associated proceedings!

Mr Nariman now insists that we should ensure an adequate legislation that Mr Nariman's interim relief before the victims of 'mass tort action … can establish and obtain a final executable decree for damages'. But he still endorses a worldview that justifies the notion that considers it 'more politic to subordinate the security of individuals and not to burden the enterprise of inevitable accidents' (p. 27).

Mr Nariman then sees no difference between the accident that occurred in 1982 at the Bhopal UCC plant and the catastrophe that followed in 1984! Had the UCC then not altogether suppressed its own Internal Security Audit Report following the 1982 incident, the 1984 catastrophe would have simply not occurred. Far from being any 'inevitable accident', the catastrophe was entirely avoidable and ought to have been avoided. This surely is the implication even of the belated and effete UCC gesture acknowledging, on the eve of the 15th anniversary, its 'moral' responsibility. Mr Nariman has no use even now for this acknowledgement!

Instead, he informs his readers that the law based on 'fault as an essential element in tortuous liability has moved in cycles' (p. 27). This otherwise seductive analysis of the cyclical movement of tort liability fails, even now, to grasp the distinction between 'inevitable accidents' and managerially planned multinational human rights mayhems that create extensive catastrophes and mass disasters in the Third World or the Global South. Clearly, much more is at stake in Bhopal than what the throwaway phrase 'security of individuals' can never possibly suggest. Even Mr Nariman, surely in his private moment, ought to discern the difference between 'inevitable accidents' and a crime against humanity.

Indeed even now, Mr Nariman is content to state and that because 'modern technology, however safe, is not infallible, and that because the victims of misfortune, more often than not, are unable to pin down

the accident-producing activity to an ascertainable fault', we must all search for 'new rules of law' that provide a regime of interim compensation or relief (p. 27). This welcome assertion in principle altogether obscures the fact that the forensic prowess of Mr Nariman actually converted the injustice of the horrid acts of multinational corporate malefic governance into a simple and stark misfortune for the Bhopal victims! Mr Nariman would have indeed argued differently had the catastrophe occurred in Mumbai (the original location proposal for three UCC plant in the vicinity of the civilian nuclear research facility and power station).

In any event, Mr Nariman need not have taken the trouble, so late in the day, to make any fervent plea for interim relief in order to make this quasi-confessional statement that would have bewildered any priestly reception in a confessional chamber! As a matter of fact, our strategy of patiently queuing up at the durbar (where he met ordinary citizens with grievances) held by Prime Minister V. P. Singh had already resulted in his directions awarding interim relief (howsoever meagre) for the Bhopal victims, pending the outcome of the litigation. (Incidentally, on that occasion the prime minister was kind enough to confer upon me the status of an honorary citizen of Bhopal! In response to my question: 'How long shall we have to wait' he put his hand on my shoulder and said: 'I will do my best: please return to Bhopal and spread the word of assurance!')

Mr Nariman still thinks that the Supreme Court 'settlement' orders, which he no doubt mightily helped fashion for the UCC, were fully justified on the spurious reasoning that he still continues to offer (pp. 27–28). Mr Nariman, as the architect of the settlement orders, has to say only this to the Bhopal victims on the 20th anniversary: 'Settlement is a poor guide to decision-making, but toxic torts do generate a lot of it.' A nice play on words, indeed but also, by the same token, equally a 'poor guide' for understanding any literally bloody-minded justificatory performances for the 'settlement' even Twenty Years After!

Mr Nariman's invocation of Chief Justice Pathak's sonorous invocation (p. 28) is the ultimate perfidy. Pathak ostensibly and extravagantly laments, in his judicial performance, that the friends of Bhopal victims 'did not channel itself in any effort to put together a

public-supported relief fund so that the victims were not left in distress, till the final decision in the litigation'. This is a scandalous lie because, as already noted, we persuaded the V. P. Singh Cabinet to put some interim relief in place. Further, as far as we know, neither Pathak (who ordered the unconscionable settlement), nor Venkatchaliah (who ignobly strove to legitimate this against all canons of jurisprudence) has cared, as far as I know, to contribute even a farthing from their earnings and savings for the amelioration of the Bhopal violated humanity. Regardless, may I now publicly urge Mr Nariman to at least dedicate all the attorney fees earned from defending the UCC towards the costs of medical and economic rehabilitation of the Bhopal violated? Many of us have dedicated our far more meagre earnings for the cause!

Mr Nariman (p. 29) laments that none of Supreme Court's directions for the amelioration of the Bhopal victims have been implemented, either in letter or spirit. But, surely, these smacked of constitutional insincerity because of the way in which the court upheld the settlement amount and justified its 'adequacy', without ever fully taking into account the scale of deaths and the inordinate intensity of injuries and suffering for the present and future generations of the Bhopal victims.

In any event, Mr Nariman now occupies an eminent position as a learned nominated member of the Rajya Sabha and in that role he may develop and press a 'New Deal' for the still suffering Bhopal victims. Incidentally, his legislative tenure will alas also coincide with the Silver Jubilee of the catastrophe. Yet, hitherto his most spectacular initiative in that role consists in launching a Private Member's Bill confiscating the daily allowances of the variously absentee members of the Indian Parliament.

Thus far, I have addressed you as Mr Nariman. Now, in conclusion, may I address you as dear Fali (as a marker of our pre-Bhopal era esteemed friendship) to join us in our struggle for the restoration of justice to the Bhopal violated humanity? Both of us are now, indeed, in the evening of our lives, or more hopefully put, in its late afternoon! I fancy that we both remain indefatigably dedicated, if I may say so, to a vision of the rule of law that incrementally, even when not progressively, tends to make governance just, power accountable, and state ethical.

No doubt, dear Fali, our understandings of the future of human rights differ both in visions and methods of pursuit. Even so, surely our difference ought not to remain so unbearable/unbridgeable as to deny an order our common human rights responsibilities of working together to ensure that the Bhopal violated humanity may no more be further, and forever, remain re-victimized by the culture of impunity so heavily manifest (to quote Prince Hamlet) in the arrogance of power and the 'insolence of office'?

The founder editor of *Seminar*, Romesh Thapar, valiantly endeavoured to combat injustice and rightlessness of the Internal Emergency of 1975–76. He imagined the constitutional right of the free press (and now electronic media) in terms of servicing the defence of those disarticulated by dominant formations of power. The UCC, and its normative cohorts, now declare an even more perennial enduring state of emergency against the present Bhopal victims and their next of kin in a relentlessly globalizing India, and indeed beyond. Surely, *Seminar* must now stand up and be counted as an authentic voice for the Bhopal victims.

Upendra Baxi
Warwick, UK

Further communication (from Vijay K. Nagaraj and Nithya V. Raman):

December 14, 2004

We read your article, 'Some Reflections' in the *Seminar* issue on the Bhopal gas disaster with great interest. As people who have great respect for your work, especially recently on Gujarat, we were surprised to learn during our research on the Bhopal disaster that you represented Union Carbide in the Indian courts against the victims. We found your article thought provoking, but it left us with some questions.

You argue in your article that the 'toxicity of anger' of victims in toxic tort cases like the Bhopal gas tragedy results in a 'built-in inhibition to an early settlement of claims at a reasonable figure' (emphasis added). In the Bhopal case, the settlement was based on a set of unknowns, such as the number of deaths and the nature and

extent of personal and property damage. The present official death toll is five times the number on which the settlement was based. Damages have been estimated in the billions of dollars. At no time before the settlement was announced were the victims consulted. Under such circumstances, can the Bhopal settlement be accurately characterized as ‘reasonable’?

You also argue in your piece for the creation of a fund using money from the government, voluntary contributions, and industries themselves to provide immediate relief for victims of mandate disasters, a practical and noble idea. Yet, when the Bhopal disaster took place no such existed. In its absence, what is the appropriate solution to give timely and adequate compensation to victims of manmade disasters?

Your article dismisses the idea of the company being held liable, the ‘polluter pays’ principle an established principle in both Indian and international law. You suggest that this is a ‘strange response’ evoked purely by ‘anger against the industrial enterprise believed to be responsible’. You also rebuke ‘do-gooders’ from ‘affluent sections of society’ who ‘share the rage of the victims’ against Union Carbide but failed to put together a public-supported relief fund for the victims.

It strikes us as strange that you believe that making the public in a developing nation pay for the negligence of a transnational corporation attempting to take advantage of cheap labour and lax environment regulations makes more sense than asking the polluter to pay. Keeping in mind the Indian government originally asked for over $3 billion from Union Carbide in the American courts for damages, how much money do you think is a reasonable amount for the people of India to have given to Bhopal victims?

Since the disaster, along with the survivors, numerous ‘do-gooders’ including doctors, lawyers, environmentalists, activists, journalists, students, and many others have worked to raise funds, treat victims, record the effects of the disaster, study ongoing pollution from the plant site, and bring attention to the continuing plight of the victims in Bhopal. The attention the 20th Anniversary of the disaster received was an indication of the strength of the collective action of so many survivors and ‘do-gooders’ from all over the world. It is our hope that the continued international attention paid to the Bhopal gas disaster

will bring us closer to an international legal framework that will cover the actions of multinationals in all countries in which they operate, and ensure that victims of manmade accidents secure speedy compensation and justice.

Dear Mr Nariman, as for 'do-gooders', we admit fully, we have still not done enough. But we ask you sincerely, what example have you, as a distinguished lawyer, an affluent member of society, and a Member of Parliament, set for us in aiding the victims of Bhopal?

Vijay K. Nagaraj and Nithya V. Raman
Rajsamand, Rajasthan

Response of Fali Nariman to the Comments of Professor Baxi and M/s Vijay K. Nagaraj and Nithya V. Raman

In November last year I was invited to contribute my reflections on the Bhopal tragedy – twenty years down the road. I agreed. The article was then published in the December Issue of the *Seminar*.

Obviously Prof. Baxi read the article. Obviously, he did not like it. And he also did not like the idea that some readers may find the suggestions useful or interesting. On 3rd January he e-mailed an 'Open Letter to Fali Nariman' to the *Seminar*. It is only through the editor's good offices, that I came to know that he had written such a letter: Baxi's Open Letter was forwarded to me by Tejbir Singh on 11th January asking me if I cared to respond and I said I would, and thanked him for the courtesy.

Prof. Baxi's opening sentence is a trifle pretentious: 'I had to regretfully decline the invitation to contribute to the *Seminar* issue dedicated to the 20th anniversary of the Bhopal catastrophe because of my resolution not to share any public platform with Fali Nariman ever since he assumed the UCC advocacy.' Sounds good – but not accurate. Baxi never made known to me his self-resolved ostracism of Nariman: on the contrary, on Prof. Baxi's infrequent visits to India, whenever occasionally we met he always greeted me with warmth and cordiality. The opening sentence takes me by surprise, as so does the rest of the letter. Till I read his open letter I did not know that Baxi had been

invited by the editor to contribute an article for the December issue. If I had known that he wanted to do it solo, I would have gladly told the editor – 'Please publish his article and send back mine.'

Baxi says little about the points made in my December article nor does he suggest anything about the lessons to be learnt from it. Instead he fulminates at my shortcomings in the *Bhopal* case, in the course of which he severely castigates two chief justices of India as well – for initially approving the Bhopal settlement, and then re-endorsing the court's approval once again in a review. As are all apex courts in any country, the Supreme Court of India is 'infallible', only because its judgments are final. And since 1991 (the last of the three major decisions of the Supreme Count in the *Bhopal* case) there has been no attempt on the part of jurists like Baxi (despite all the sound and fury in his open letter) to move the court to re-consider or revise its findings in any of its judgments: on the basis of new material or any other credible evidence.

But criticism of decisions of courts, and of lawyer's arguments in them, howsoever motivated and howsoever worded, are part of the give-and-take of a practising lawyer's life, and also all in the course of a day's work of a judge. And I would have left it at that. But I never realised till I read this 'Open Letter' that Baxi had so much pent-up personal hatred for me. I have none for him.

He apparently bears me a 20-year-old grudge that I should never have agreed in the first place to appear for UCC in the civil case. On the (sometimes questionable) assumption that as one grows older one becomes wiser as well, he may be right. The problem about human failings is that sometimes one lives to regret them. But I too have a grudge against Baxi – not a 20-year one – but a 30-year-old one. He writes that: 'The founder editor of *Seminar*, Romesh Thapar, valiantly endeavoured to combat injustice and rightlessness of the Internal Emergency of 1975–76.' Yes, Romesh Thapar did. But regrettably, Baxi did not. If he did combat the excesses of the Internal Emergency it was only after it was lifted, and this puts him in an entirely different league from the founder–editor of *Seminar*. After I resigned as additional solicitor general of India on 26th June 1975 in protest against the imposition of the Internal Emergency, I heard and saw Professor Baxi keep extolling its virtues in broadcasts to the nation –

over Doordarshan, not in one broadcast but in several, in one of which he described the Internal Emergency as an act of rare statesmanship, necessary for disciplining the populace of India! My family and I remember this as vividly as Baxi remembers my role in the *Bhopal* civil case. Another problem with human failings is that one seldom recalls one's own.

Frankly, I believe – and I say this generally and without attribution to anyone – that all human beings, all of us, in whatever sphere of activity we operate, should try and avoid deserving the plaudits of populism. Many years ago, the noted commentator Alistair Cooke wrote a brief character study of King Edward VIII – the man who abdicated the English Throne to marry a divorced socialite. Alistair Cooke's little piece was not flattering to the monarch-of-the-moment: but the punchline at the end was simply devastating:

> The most damning epitaph you can compose about Edward – as a Prince, as a King, as a man – is one that all comfortable people should cower from deserving, he was at his best only when the going was good.

I now respond to the letter dated 14th December, 2004, of Vijay K. Nagaraj and Nithya V. Raman; their doubts and queries are far less choleric; and in a tragedy of such grave proportions, a rational answer to the queries must be attempted. First they ask: 'What is the appropriate solution to give timely and adequate compensation to victims of manmade disasters?' The answer is that the Bhopal tragedy highlighted the need to set up on a permanent basis a National Disaster Fund so that timely relief to those who suffer in a future manmade disaster is promptly available, and does not have to await the outcome of a legal proceeding to establish liability. In England there is a Disasters Emergency Committee set up on a permanent basis which has widespread support of the media and the banks and other agencies. Its rapid-response network functions so well that in November 1999 it was able to launch a national appeal not for any disaster in the United Kingdom but for the cyclone in Orissa. Within three weeks it was able to raise from the British public £4.5 million, an eye-opener of what can be done if the will and the network is there.

M/s Nagaraj and Raman then state: ‘Keeping in mind that the Indian Government originally asked for over $3 billion from Union Carbide in the American courts for damages, how much money do you think is a reasonable amount for the people of India to have given to Bhopal Victims?’ They also point out that at no time before the settlement was announced were the victims consulted. They state that the death toll is now five times the number of deaths on which the settlement was based. And the query they pose is, ‘Whether, under such circumstances, could the Bhopal settlement be accurately characterised as “reasonable”? And if not, what should be alone?’

Good questions. But all these questions have been raised before, and they have all been answered in binding decisions of the Supreme Court of India – binding on us all: first in the judgment dated 4.5.1989 of the Constitution Bench of the Supreme Court (of five judges presided over by Chief Justice Pathak) explaining the reasons why the court approved the settlement of February 15, 1989 (reported in 1989 3 SCC 38), next in the judgment dated 22.12.1989 of another Constitution Bench decision of five Judges presided over by Chief Justice Mukharjee, upholding the validity of the Bhopal Act (in Sahu’s case: 1990 1 SCC 613); and third, in the judgments of Chief Justice Mishra and of Justices Venkatchaliah and Ahmadi reported in the Constitution Bench decision of five judges dated 3.10.1991 which heard and negatived the review petitions against the court-approved settlement: (1991) 4 SCC 584: the last case specifically dealt with the point about non-consultation with the victims and whether it vitiated the settlement, and as to whether the settlement fund was inadequate and if it ever became inadequate what was the remedy. I will refer to the relevant findings of the court as expressed in these judgments.

First, by its cryptic order dated 14.2.1989 (reported in 1989 (1) SCC 674) the Constitution Bench of the court directed that there be an overall settlement of the claims in the Bhopal suit for 470 million US dollars. The reasons for this order were set out in a subsequent order of the Constitution Bench dated 4.5.1989 (reported in 1989 (3) SCC 38): as to why and how the court had arrived at the settlement figure of 470 million US dollars and why the court considered this sum to be ‘just, equitable and reasonable’ for settlement of all civil claims. The attorney general representing the Union of India (which under the

Bhopal Act statutorily represented all claimants) had himself suggested to the court that a minimum of 500 million US dollars be made the basis of the settlement, and the court's judgment dated 4.5.1989 specifically mentions this fact. The judges then set out in detail (in paras 22–29) the estimates they had made for adopting the total quantum of compensation. But they had also then contemplated the possibility of the judicial approval of the settlement being overturned. At page 51 of 1989 (3) SCC this is what they said:

> … If, owing to the pre-settlement procedures being limited to the main contestants in the appeal, the benefit of some contrary or supplemental information or material, having a crucial bearing on the fundamental assumptions basic to the settlement, have been denied to the court and that, as a result, serious miscarriage of justice, violating the constitutional and legal rights of the persons affected, has been occasioned, it will be the endeavour of this court to undo any such injustice. But that, we reiterate, must be by procedures recognised by law. Those who trust this court will not have cause for despair.

These observations then led to a series of review petitions and in the subsequent proceeding (in the Review Petitions) – which was argued for several weeks – the main challenge was that 'the quantum of compensation settled was grossly low': after investigation, the Constitution Bench negatived this main challenge: after specifically noting that the claim for compensation made by the Union of India in the Bhopal suit was for a sum of 3 billion dollars (Rs. 3,900 crores). 'The voluminous documentary evidence placed on the record of the present proceedings,' the Court said, 'does not make out a case of inadequacy of the amount necessitating a review of the settlement.' It was then contended that:

> The 'Court assisted settlement' was as between, and confined to, the Union of India on the one hand and UCC and UCIL on the other. The Original Suit No. 1113 of 1986 was really and in substance a representative suit for purposes and within the meaning of Order XXIII Rule 3B CPC inasmuch as any order

made therein would affect persons not Eo nomine parties to the suit. Any settlement reached without notice to the persons so affected without complying with the procedural drill of Order XXIII Rule 3–B is a nullity.

It was also contended that:

> In concluding that the settlement was just and reasonable the court omitted to take into account and provide for certain important heads of compensation such as the need for and the costs of medical surveillance of a large section of population, which though asymptomatic for the present was likely to become symptomatic later having regard to the character and the potentiality of the risks of exposures and the like future damages resulting from long term effects and to build in a 're-opener' clause.

And there was the still further contention viz.:

> Does the settlement require to be set aside and the Original Suit No. 1113 of 1986 directed to be proceeded with on the merits? If not, what other reliefs require to be granted and what other directions require to be issued?

Each of these contentions were answered in detail in the main judgment (delivered by Justice Venkatachaliah, speaking again for a Constitution Bench of the court) – all these contentions were, after due consideration, rejected (1991 4 SCC 584).

As to the settlement fund (the 470 million US Dollars paid in by UCC) being ultimately found inadequate (because of larger number of deaths in future or the like) the court said:

> 198. After a careful thought, it appears to us that while it may not be wise or proper to deprive the victims of the benefit of the settlement, it is, however, necessary to ensure that in the – perhaps unlikely – event of the settlement fund being found inadequate to meet the compensation determined in respect of all the present claimants, those persons who may have their claims

> determined after the fund is exhausted are not left to fend for themselves. But, such a contingency may not arise having regard to the size of the settlement fund. If it should arise, the reasonable way to protect the interest of the victims is to hold that the Union of India, as a welfare State and in the circumstances in which the settlement was made, should not be found wanting in making good the deficiency, if any. We hold and declare accordingly.

The court said that requiring the Union of India to make good the deficiency, did not impute to it the position of a joint tortfeasor but only a welfare State. However on this point (and on this point alone) one of the judges (Justice Ahmadi) dissented: but in dissenting this is what Justice Ahmadi said: (1991 (4) SCC at p. 694, para 220)

> 220 … If I had come to the conclusion that the settlement fund was inadequate I would have done the only logical thing of reviewing the settlement and would have left the parties to work out a fresh settlement or go to trial in the pending suit. In the *Sahu* case as pointed out by Mukharjee, C. J., the victims had not been able to show any material which would vitiate the settlement. The voluminous documentary evidence placed on the record of the present proceedings also does not make out a case of inadequacy of the amount, necessitating a review of the settlement. In the circumstances I do not think that the Union of India can be saddled with the liability to make good the deficit, if any, particularly when it is not found to be a tortfeasor …

Then the important question posed to itself by the court was:

> But what about those who are presently wholly asymptomatic and have no material to support a present claim? Who will provide them medical surveillance costs and if at some day in the future they develop any of the dreaded symptoms who will provide them with compensation? Even if the award is a ‘once and for all’ determination, these aspects must be taken into account.

On this, the following findings were recorded and the following directions were given:

(a) For a period of eight years facilities for medical surveillance of the population of the Bhopal exposed to MIC should be provided by periodical medical check-up. For this purpose a hospital with at least 500 beds strength, with the best of equipment and facilities should be established. The facilities shall be provided free of cost to the victims at least for a period of eight years from now. The state government shall provide suitable land free of cost.

(b) In respect of the population of the affected wards (excluding those who have filed claims), Government of India shall take out an appropriate medical group insurance cover from the Life Insurance Corporation of India or the General Insurance Corporation of India for compensation to those who, though presently asymptomatic and filed no claims for compensation, might become symptomatic in future and to those later-born children who might manifest congenital or pre-natal MIC related afflictions. There shall be no upper individual monetary limit for the insurance liability the period of insurance shall be for a period of eight years in future. The number of persons to be covered by this group shall be about one lakh persons. The premia shall be paid out of the settlement fund.

(c) On humanitarian consideration and in fulfilment of the offer made earlier, the UCC and UCIL should agree to bear the financial burden for the establishment and equipment of a hospital, and its operational expenses for a period of eight years.

When the letter of M/s Nagaraj and Raman raise rational questions about the *Bhopal* case, I only offer them quotes from judgments of the Supreme Court. This is not in any spirit of one-upmanship, but only because the specific questions that trouble them appear to have been answered in successive decisions of the apex court. If they have been wrongly answered (as Prof. Baxi has in his open letter repeatedly suggested) the mandate of the Constitution is that judgments of the

highest court until reversed are binding on us all: and no one, not even Prof. Baxi has ever approached the court that its recorded findings be reversed.

In his Open Letter, Prof. Baxi has described Chief Justice Pathak's judgment in 1989 (3) SCC 38 in ordering the settlement as 'unconscionable' and has characterised it as 'the ultimate perfidy'. He has then condemned Chief Justice Venkatchaliah's judgment in 1991 (4) SCC 584 (refusing to again review and set aside the settlement) as 'ignobly striving to legitimate this (settlement) against all canons of jurisprudence'. But we must leave 'jurisprudence' and high-sounding phrases to jurists: it is not given to lesser mortals to castigate and tear apart judgments of successive Constitution Benches of the Supreme Court – not one judgment, not two judgments, but three of them: benches headed by different justices (Pathak CJ, Mukharjee CJ, and Mishra CJ). Besides, harsh words do not undo judgments nor findings made in them. And under our system of jurisprudence Parliament cannot by legislation undo or set aside findings made in judgments of the highest court: that can only be done by the court itself.

Another comment by M/s Nagaraj and Raman is that they understand my article to have suggested that the UCC could not be held liable on the polluter-pays principle. Far from it: it is on this very principle that the settlement of 470 million US dollars was fashioned, agreed to by the Union of India through its attorney general, and accepted as reasonable, fair and valid by the Supreme Court: not once (1989 3 SCC 38), not twice (1990 1 SCC 613) but again a third time after contest (1991 4 SCC 584) and after hearing counsel for all NGOs who chose to appear.

Then again, it is not I who had rebuked the 'do-gooders'. Far from it. It was the court which had said 'it is indeed a matter for national introspection that public response to this great tragedy which affected a large number of poor and helpless persons limited itself to the expression of understandable anger against the industrial enterprise but did not channel itself way effort to put together a public supported relief fund so that victims were not left in distress till the final decision in the litigation.' I quoted this in my Article: In his open letter, Baxi characterises the quote from the judgment of Chief Justice Pathak as a 'scandalous lie' – but no attempt was made by Baxi or by anyone else

at any time to apply to the court to delete this paragraph as 'scandalous' or even as 'false' or 'incorrect'.

Lastly, as to what example can I set or have I set – 'for aiding the Bhopal victims' I confess 'none': except to draw pointed attention to the grave deficiencies in our law (and what the Supreme Court had said way back in 1990 about the grave deficiencies in our existing law and the need to reform it) – in order to guard against, and especially in order to guard against, future Bhopal-like disasters: that was in fact the thrust and purport of my article headed: 'Some Reflections'.

Fali S. Nariman,
Delhi

After the above 'communications' got published in the February 2005 issue of *Seminar*, Upendra Baxi sent me an e-mail dated 16 February 2005 thanking me for what he described as my 'spirited rejoinder'. He also wrote: 'Please allow me, at this distance, to clarify a couple of aspects …' In fairness to him this e-mail (upto now unpublished) is also reproduced. I give him the last word!

Subject: Bhopal
Date: Wed, 16 Feb 2005 03:29:03 EST
From: BaxiUpendra@aol.com
To: fnariman@sansad.nic.in
CC: U.Baxi@warwick.ac.uk

Dear Fali (if this is a form of address you would still allow me)!

Many thanks for your spirited rejoinder to my own in the pages of the *Seminar*. We both share the virtues of robust public dialogue and respect each other amidst many differences on human rights issues. That is how it should be and reiterate my appreciation, overall, of your response. Inevitably, in the thrust and parry of public discussion, we make points without necessarily joining issues. On such rhetorical stuff and style (woof and warp) often depend the ways of articulation of public issues.

Please allow me, at this distance, to clarify a couple of aspects in our discussion.

First, there is no question of articulation, as you put it, of any 'pent-up personal hatred' on my part for you. Let me assure you of its absence in its fullest plenitude. But I realize now even more fully, how honest differences of opinion in the Indian public culture get, almost all too often remain mired and caricatured, often cruelly, in terms of personalized politics, a tendency that I have combated all through, perhaps unsuccessfully, in my associational public life in India. Of course, I bear no individualized animosity to you, now that it does need saying in fulness. Further, I have always respected your reasoned loyalty to fostering of a public/civic culture of power and accountability and I am fully prepared to celebrate this, as it were, from the rooftop. Your dedication to civil and political rights is indeed exemplary in the Third World of law and human rights and I respect you fully for this and it is always a source of historic pleasure to reiterate this in all, my scholarly and activist work. I apologize if the context of my *Seminar* contribution did not provide an occasion to fully acknowledge this.

Second, I sincerely believe (and you may equally sincerely believe that I remain mistaken) that your active defence of the UCC did a great harm to the protection and promotion of human rights. To say this is not to attack in any way your otherwise impeccable personal and professional credentials. Fali, you may say that the matters end where your professional conscience begins. If more than 2,00,000 Bhopal victims and those acting on their behalf think otherwise, don't they also deserve the dignity of equal respect?

Third, as concerns acts of 'ostracism', I did not think that I needed to announce this as publicly as I did with our common friend Krishna Iyer. In that situation when he wrote an indefensible open letter to Rajiv Gandhi concerning the bill that overwrote the Shah Bano judgement, I publicly stated my reasons for not sharing any public platform with him for a period of years. It was gracious of him that he allowed our friendship to withstand this public contestation. In our situation, I practised abstinence from sharing public platform with you ever since your advocacy of the *Bhopal* case, even to the point of not attending your inaugural address on the academic event of the UPPASI conference a few years ago that finally generated the publication of *India's Living Constitution*. This act of public protest on my part, as

with Krishna, did not preclude grace and courtesies to which you refer in the opening paragraph of my 'trifle pretentious' declining of my reason of contribution of the *Seminar*.

Fourth, and surely you know this, you hit, I suspect knowingly below the belt, especially when you write: 'I heard and saw Professor Baxi extolling its [the Emergency] virtues in broadcasts to the nation over Doordarshan, not in one broadcast but over several, in one of which he described the Internal Emergency as an act of rare statesmanship.' This hyperbole, if I may say so, betrays your otherwise vaunted gift of talented lawyering accurate forms of recall! A simple recall to the archives of DD will sustain the inaccuracy, even the patent and somewhat libellous, accusation, not at all germane to my appreciation of the valiant Romesh Thaper.

I contributed to his request for a foreword to an emergency issue of the *Seminar* and explained rather fully some common misperceptions concerning my so-called role during the Emergency in my *Supreme Court and Indian Politics*. This is far in excess of any academic retrospection concerning the Emergency. It no doubt pales into insignificance, dear Fali, with your brave act of demitting the office of the attorney general of India. Yet, may I be permitted to think that other less exalted performances deserve some, if not equal, notice?

Fifth, I can only guess what you actually know in terms of the ringside view of the judicial circus of settlement orders. Obviously, we differ profoundly concerning the architecture of judicial perfidies or performance. I had hoped that your response, twenty years after, would at least have been consistent to your understanding of human rights responsibilities of a human rights lawyering, long since released of professional privilege. Even state archives remain unprotected by a thirty year requirement of official disclosure. I must now await a decade of life, against all available health evidence to the contrary, of how the settlement orders eventually were accomplished. But activist lifetimes even when perishable hopefully have an appeal beyond individual longevity. I hope that future archival retrieval will respond much better to the many issues of contention between us.

What a long way of saying 'Thanks', Fali, for your animated rejoinder!

Much love to Bapsi and you,

Upen
Dr Upendra Baxi

So there you have it all, dear readers – 'with roughnesses, pimples, warts and everything …'

Notes and References

1. *Union Carbide Corporation vs Union of India*, 1989 (2) SCC 540
2. *Union Carbide Corporation vs Union of India*, 1989 (3) SCC 38
3. The letter gives a more detailed account of the proceedings in Bhopal and ultimately in the Supreme Court of India.
4. English translation of The Rubaiyat of Omar Khayyam by Edward FitzGerald (2005) – Adamant Media Corporation, London.
5. Reproduced in the *Oxford Dictionary of Quotations*, p. 167.
6. Author of that extremely well-researched book, *Law, Poverty and Legal Aid: Access to Criminal Justice* (2004), LexisNexis, Butterworths.
7. Edited by Tejbir Singh.
8. Order dated 19 July 2004 of a bench of the Supreme Court of India (Justice Shivraj Patil and Justice B. N. Srikrishna).
9. '94. Supplemental proceedings – In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed …

(e) Make such other interlocutory orders as may appear to the Court to be just and convenient.'

10. '9. Courts to try all civil suits unless barred – The courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.'

11. *Smt. Vidya Devi vs Madhya Pradesh State Road Transport Corporation*, AIR 1975 M. P. 89, para 7 (Justice G. P. Singh and Justice K. K. Dube):

Before applying any rule of English Law on the ground of justice, equity and good conscience the courts in India must consider whether it is suited to Indian society and circumstances. Where a rule of English common law has been modified or abrogated by the English Legislature, it is open to the Indian courts to reject the outmoded common law and apply the new rules of the legislation.

12. 1991 (4) SCC 584, p. 615

13. *The Trusting Heart: Great News about Type A Behaviour* (1989), Dr Redford Williams (Duke University) – Random House Value Publishing.

14. C.A. Nos. 3187, 3188 of 1988 – 4 May 1989: *Union Carbide Corporation vs Union of India and Vice-Versa*, 1989 (3) SCC 38

15. 1990 (1) SCC 613

Chapter 11

The Good and the Great

G. K. Chesterton once remarked that 'Angels can fly because they take themselves lightly'. The Dalai Lama is neither clever nor worldly; he is simple, compassionate and wise, and he takes himself lightly.

The Dalai Lama – A Personal Reflection and Tribute

The International Commission of Jurists (ICJ) has been concerned about the developments in Tibet for over four decades. In the year 1959, it published its first report, 'The Question of Tibet and the Rule of Law', which provoked a debate in the UN General Assembly at which Ireland's foreign minister, Frank Aiken, spoke these inspiring words:

> Looking around this Assembly, and looking at my own delegation, I think how many benches would be empty here in this hall if it had always been agreed that when a small nation or a small [number of] people fell into the grip of a major power, no one could ever raise their case here; that once they were a subject nation, they must always remain a subject nation.

A later, more sustained, expression of ICJ's concern was its second report, 'Tibet: Human Rights and the Rule of Law' (published in December 1997).

On 10 March 1998, six brave Tibetans (their ages ranging from 70 down to 25) went on a hunger strike at a prominent place in Parliament Street, New Delhi. They were protesting against the cultural genocide in Tibet. The ICJ Headquarters in Geneva informed me about this and I wrote letters to various authorities – but received only a few official responses. In the last two weeks of March, a few sympathizers (including actor Richard Gere, and Christa Meindersma of the Netherlands section of the ICJ) attempted to dissuade the Tibetans to give up their fast unto death, but to no avail.

Fali Nariman with Adama Dieng (secretary-general of the ICJ) and
Michael Kirby (chairman of the Executive Committee of the ICJ) in Geneva

Eventually, the secretary general of ICJ, Adama Dieng, specially flew out of Geneva to see what could be done to relieve the travails of the hunger strikers, and their helpless sympathizers. He arrived on 11 April 1998, and went to meet the six men, but they were adamant. Then, the next evening (12 April), Adama and I called on His Holiness the Dalai Lama at the Centaur Airport Hotel in Delhi. He was staying there, on his way to Dharamshala – having returned from a trip to Japan. Deeply moved by the gesture of Adama coming all the way from Europe, His Holiness warmly embraced him. He then told us the dilemma he faced – violence against anyone including one's own self was contrary to the Buddhist faith, and personally he abjured fasts unto death; but he also told us how helpless he felt when he went to meet his compatriots in Parliament Street on the day he landed from Japan – in the first week of April. He tried to deter them from their firm resolve, but the poignant determination in their eyes and faces *did not* compel him to exercise his temporal or spiritual authority over them. He just could not say the words, 'Stop this fast,' especially since he could not offer them any viable alternative, not even a frail branch of hope they could cling on to, in all conscience. He then explained to us his personal philosophy, in that staccato manner of speaking, that has endeared him to millions around the world:

> I, believe (eh) that individuals can make a difference in society. Every individual has a responsibility (eh) to help guide global family in right direction and we must each assume [that] responsibility. As [a]

> Buddhist monk I try – try develop compassion within myself, not simply as religious practice but on human level also. I (eh) sometimes find it helpful to imagine self as single individual on one side, on the other a huge (eh) gathering of all other human beings. Then I ask, 'Whose interests are more important?' To me it is quite clear. However important I may feel I am, I am just one individual while others are infinite.

The Dalai Lama had unwittingly taught us a lesson about humility in greatness.

What impressed me most in the course of our hour-long interview with His Holiness was his benign benevolence and childlike humility, and the complete absence of revulsive feelings or hate (for the People's Republic of China (PRC) or its representatives). The Dalai Lama was not enamoured of the ICJ's recommendation of 'self-determination' for Tibet! He is not seeking full independence for Tibet; he only wants Tibet to be a truly autonomous unit of the PRC. However, the cultural onslaught within Tibet had to be stopped. But his faith in the inevitable was endearing. 'It will come. It will all come,' he said with refreshing optimism. 'And what we do will ultimately help not only the Tibetans but the Chinese people as well,' he added with beaming confidence. The Dalai Lama said that he would like to see Tibetans being spiritually reinvigorated in the faith of their forefathers and be 'suitably educated' for attaining the exacting standards of self-governance in a fast-moving, closely integrated technological world. This (he said) will take about 15 years. And when they are fit to govern themselves democratically, they could then strive and work for political independence.

Bapsi and Fali Nariman with His Holiness the Dalai Lama

G. K. Chesterton once remarked that 'Angels can fly because they take themselves lightly'. The Dalai Lama is neither clever nor worldly; he is simple, compassionate and wise, and he takes himself lightly. He is also profound. I recall an article that appeared in the *Times of India* some years ago (in the year of the Vienna Declaration, 1993). In it he had written:

> There is a growing awareness of people's responsibilities to each other and to the planet we share. This is encouraging even though so much suffering continues to be inflicted in the name of nationalism, race, religion, ideology and history. A new hope is emerging for the downtrodden, and people everywhere are displaying a willingness to champion and defend the rights and freedoms of their fellow human beings.
>
> Brute force, no matter how strongly applied, can never subdue the basic human desire for freedom and dignity. It is not enough, merely to provide people with food, shelter and clothing. The deeper human nature needs to breathe the air of liberty.

The most important single factor in the implementation of *human rights*, after all, is not the mass of documentation in which it is sometimes

submerged, but in the *spirit of the people*. That is the 'new hope' of which the Dalai Lama had written. Adama Dieng and I were witnesses (on 12 April 1998) to the tangible affirmations of that hope.

We were fortunate to have met with, and to have spoken to, a human being who was able to probe, without fanfare or ostentation, the essential human spirit and unravel its secret in simple words, easy for all to understand – 'The deeper human nature *needs* to breathe the air of liberty.'

Fali Nariman with His Holiness the Dalai Lama in March 2010

But what kept ringing in my ears was his eternal faith in the goodness of things. 'It will come. It will all come.'[1]

* * *

Mother Teresa

The first lesson that the sages of the Upanishads teach is the inadequacy of the intellect. Not that the intellect is useless – it has its modest place, and serves us well when it deals with tangible things; it falters before the Eternal, the Infinite and the elementally real. Human rights are about the elementally real. Their universalization can be achieved through the hearts of men and women – through their experiences. This is what Mother Teresa believed, and my wife and I were privileged to have known her.

When she was conferred the Nobel Peace Price in 1979, she mentioned in her acceptance speech at Oslo (in February 1980) that the right to live was, universally, the most fundamental of all human rights. I heard the radio

broadcast of her speech – it was inspiring; in it the Mother recalled an incident in Calcutta (now Kolkata) which showed how anxious were the poorest and the lowliest to protect the right to life, not for themselves alone, but also for others. She spoke simply and with compassion; her acceptance speech was later published, and I quote from the text:

> I had the most extraordinary experience with a Hindu family who had eight children. A gentleman came to our house and said, 'Mother Teresa, there is a family with eight children: they have not eaten for so long; do something.' So I took some rice and went there immediately. And I saw the children – their eyes shining with hunger. I don't know if you have ever seen hunger. But I have seen it very often. And she took the rice, she divided the rice, leaving some for her family and then she went out with the rest. When she came back I asked her: 'Where did you go, what did you do?' And she gave me a very simple answer, 'They are hungry also.' What struck me most was that she knew – and who are they? A Muslim family – and she knew. I didn't bring more rice that evening because I wanted them to enjoy the joy of sharing.

Mother Teresa – like Mahatma Gandhi – emphasized the need to not only universalize human rights but also to universalize respect for them.

Bapsi Nariman conversing with Mother Teresa

Many years ago, my wife Bapsi (who used to do some charity work for Mother Teresa) and I were travelling in an Air-India (now Air India) plane to Rome. We were the only occupants in the first class other than her. Mother Teresa never travelled in the first class out of the charity funds donated to her but only because J. R. D. Tata, during his lifetime, had ordered that whenever Mother Teresa travelled by Air-India, she should always be accommodated in first class, free of charge to any place wherever the flights were scheduled. He had also ordered that when she left the plane, she was to be given all available sweets and chocolates for the children whom she looked after!

While we were in the plane, on our way to Rome, we chatted for a while and she expressed her personal gratitude for some work that I had done for her. She also asked my wife about the memento of Good Luck she had given her a few years ago, and was it still with her? – *She remembered*! Then, she quietly curled up on her seat and went to sleep. There were a number of Italians travelling at the back of the plane and when they heard that Mother Teresa was with them, they came in droves and photographed her – with a flash. Whenever the flash went on, she would open her sweet little eyes and say, 'Thank you,' and drop off to sleep again! When we got down at Rome, we assisted her with all the bundles of sweets and chocolates that the Air-India crew had wrapped up for her. I asked her whether she was going to meet the Pope, 'No – no! Why trouble the Holy Father?' she said in genuine humility.

In this world of violence and 'ethnic cleansings', one is appalled at the human capacity for evil, but one is also overwhelmed by the capacity of people to be good. Mother Teresa was great and good. So is His Holiness. A few years ago, Archbishop Tutu, speaking in a cathedral in London, asked his audience (rhetorically) as to why Mahatma Gandhi, Mother Teresa and the Dalai Lama were so popular, and why Nelson Mandela was such an icon. He did not wait for an answer, and offered one himself:

> (because) … all of us have an instinct for goodness and we recognise it (when we see it) … People are proud to be human because *they* tell them this is what human beings can become. Even with all the awfulness with Kosovo and so on, we have to keep reminding people that *good things do happen* …[2]

Yes – *good things* like the Dalai Lama and Mother Teresa *do happen*, and we all are richer by reason of this happening.

Notes and References

1. Reminiscent of one of the most beautiful stanzas in Tagore's poem, 'Gitanjali':

Have you not heard his silent steps? He comes, comes, ever comes.
Every moment and every age, every day and every night he come, comes, ever comes.
Many a song have I sung in many a mood of mind, but all their notes have always proclaimed, 'He comes, comes, ever comes.'
In the fragrant days of sunny April through the forest path he comes, comes, ever comes.
In the rainy gloom of July nights on the thundering chariot of clouds he comes, comes, ever comes.
In sorrow after sorrow it is his steps that press upon my heart, and it is the golden touch of his feet that makes my joy to shine.

2. *London Times*, Saturday, 1 May 1999, Archbishop Desmond Tutu was speaking in Southwark Cathedral in London's South Bank. He has a piquant sense of humour. He began his speech with the remark: 'I wish I could tell you that I was tickled pink to be here, but with my complexion this observation would have been inappropriate!'

Chapter 12

An Interlude

When we gave ourselves a Constitution, it was certainly good to provide rights enforceable against a state or state agencies. But I believe that it would have made a difference in our attitudes and our national consciousness if we had also stressed on the duties and responsibilities of citizens in one state towards citizens in another, such as the duty to share equitably the waters of an interstate river.

*I*n one of the letters reproduced in the last but one chapter, Vijay K. Nagaraj and Nithya V. Raman had written, ‘as people who have great respect for your work especially recently on Gujarat …’ This cryptic reference to Gujarat is the next interlude in my career to which I must refer.

Prior to December 1998, I was instructed and was appearing for quite some time as the senior counsel in the Supreme Court for the state of Gujarat in a public interest litigation (PIL) filed on behalf of tribals[1] who were displaced (and to be displaced) by the rising height of the Narmada Dam in Gujarat. The principal question in this PIL was whether the indigenous people of this country had an inherent right to live wheresoever they chose and in the manner in which they had been living for centuries, or whether and to what extent could they be compelled to shift to higher locations in wider public interest. Linked to all this was the question of whether there were adequate measures of rehabilitation.

While the PIL was pending in the Supreme Court of India, the then chief minister of Gujarat, Keshubhai Patel, called on me at my residence in New Delhi. It was a courtesy call, but since a few days before I had read from press reports that Christians in certain parts of Gujarat were being harassed and their Bibles were being burnt, I told him that this action (though having nothing to do with the *Narmada* case) was something which was totally anathema to me, and I would like to see this stopped. He assured me that it would be, and in fact said that really there was nothing in it.

A couple of months later, since there was some policy decision to be taken-up about improved measures of rehabilitation in the *Narmada* case the chief minister again called on me. Meanwhile, the situation of minorities appeared to have worsened according to further press reports. The media had reported that not only Bibles, but now churches were being

destroyed and desecrated in various parts of Gujarat. I was extremely annoyed and told him that unless the condition in Gujarat improved, I would have to do what I thought was correct in the circumstances.

Again came more reassurances – both orally and in writing – but all to no effect, and then ultimately in December 1998, since nothing was done at all by the Gujarat Government to alleviate the plight of the minorities, particularly the Christians, I returned my brief and said that I would not appear for the state of Gujarat in this or in any other matter. This caused a great furore.

Besides the purely egoistic, there is a point in my recalling all this. The point is that but for the revelations by the media – that is its responsibility as a free press to disseminate information which is of concern to the general public – I would have been ignorant, and would not have known, living in the capital city of Delhi, about what was happening in remote parts of Gujarat. It was the press which brought these attacks on minorities to light. And I think that it disclosed a very important aspect of press responsibility or (if you don't like the word 'responsibility') of press ethos, i.e., to always lean on the weaker side, and to effectively perform the role of an opposition to the government – whether at the centre or at the state. To me this is one of the finest attributes and an essential role of a free press. And this is why when dictatorial governments take over and parliamentary systems of governments are given a go by, the press is always the first victim.

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I now come to another series of events in my professional career viz. appearing for states before interstate water disputes tribunals: it occupied some part of my professional life as an advocate.

Our Constitution, as structured, provides that even though disputes between states can only be adjudicated in the country's Supreme Court (which is India's truly federal court), and in no other court (Article 131), an exception has been made for water disputes between states. Parliament is empowered by law to provide for adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in any interstate river or river valley (Article 262 (1)). Such a law has been enacted by Parliament viz. the Inter-State Water Disputes Act, 1956, which provides

for reference by the Government of India of complaints made by states to a high-powered tribunal to be set up for each and every separate dispute and complaint.

The Narmada Water Disputes Tribunal was one of the early tribunals set up under the Inter-State Water Disputes Act, 1956, to investigate into and adjudicate the disputes between the states of Gujarat, Maharashtra and Madhya Pradesh (and Rajasthan) regarding the waters of the Narmada, an interstate river. It had as its chairman an erudite judge of the Supreme Court, Justice V. Ramaswami.[2] He worked extremely hard and looked all around the world for assistance in solving problems arising before him. I gathered the rudiments of international river – water law (also applicable within nation states) – thanks to the learning and enthusiasm of this fine judge. (I appeared for the state of Maharashtra ably assisted by my first junior in Bombay, Bomi Zaiwalla, whose friendship and loyalty I have always cherished.)

The question as to whether it was more advantageous to build a high Narmada Dam as proposed by the state of Gujarat or a much lower dam as suggested by experts produced by the state of Maharashtra (my clients) occupied much time of the Ramaswami Tribunal. After nearly ten years of oral and documentary evidence and lengthy arguments by advocates for the states (Gujarat, Madya Pradesh, Maharashtra and Rajasthan), the final report was handed down. The high dam (the Sardar Sarovar Project) presented by Gujarat was ultimately preferred by the tribunal, and provision was made in the report for acquisition of lands along the embankments of the river, with a detailed scheme (the first of its kind in India) drawn up for relief and rehabilitation of inhabitants to be displaced by the high dam. But over the years, problems of implementation have prevented the construction of the dam to its stipulated height.

In the next tribunal, the Cauvery Water Disputes Tribunal (set up in 1990), the question as to whether pre-Constitution agreements (of the years 1892 and 1924) – they were treaties – between the Princely State of Mysore and the Province of Madras as to the flow of Cauvery waters from the upper riparian Indian state of Mysore to the lower riparian British Indian Province of Madras, engaged much time and attention of the Tribunal. The treaties had lapsed after the British Parliament enacted the Indian Independence Act, 1947, and arguments centred around whether (despite this) the treaties continued until fresh arrangements were made and were binding on the

successor states under the Constitution of India, 1950; also, whether in any case the provisions of those treaties could be reviewed or altered after the stated period of their operation had expired. The proceedings before the Cauvery Water Disputes Tribunal dragged on for so long that it had to be twice reconstituted – first, on the resignation of its first chairman (the erudite urbane retired Chief Justice Chittatosh Mukherjee), and once again because of the untimely death of one of its three members. I was lead counsel for the state of Karnataka (along with my good friends: senior advocates, Anil Divan and Sharad Javali, and Advocate Mohan V. Katarki). When after nearly 20 long years, a final decision was handed down by the reconstituted tribunal (on 5 February 2007), it was immediately subjected to a challenge in the Supreme Court of India by the states of Karnataka (my clients) and Kerala – challenges that had been accepted and admitted to a hearing by a larger bench, since constitutional questions raised can be finally pronounced upon only by the country's highest court. The state of Tamil Nadu, having initially welcomed the decision of the Cauvery Water Disputes Tribunal, also challenged it in the Supreme Court by filing a special leave petition (SLP) under Article 136[3] of the Constitution. This SLP has also been admitted and referred for hearing to a larger bench of the court. The result is that after nearly two decades a final 'resolution' of the dispute is yet not in sight!

My experience is that none of the political parties in any of the complainant or contesting states (in interstate water disputes) are ever willing to concede a single point to the other state. For instance, in the Cauvery Water Dispute, the farmers and the politicians in Karnataka cutting across political-party lines have been (and are) in no mood to sacrifice irrigation or drinking water needs of Karnataka to accommodate the people of Tamil Nadu. Likewise, the farmers and politicians in Tamil Nadu are unwilling to change their century-old cropping patterns, and insist on an undisturbed flow of water as mandated in the 1924 agreement between the erstwhile state of Mysore and the British-Indian Province of Madras. Neither of the states will yield an inch.

Water allocation by interstate water disputes tribunals is simply not acceptable to political parties or governments of contesting states. The only inevitable acceptability would be to a decision of the country's highest court. The decisions of the Supreme Court of India are final not because

they are infallible, the decisions of the Supreme Court are infallible only because they are constitutionally final.

Resolution of water disputes by 'agreement' is readily forthcoming when the government at the centre has been 'strong'; not when the government at the centre has been 'weak'. With a single party government in power at the centre (upto the late 1970s), it was possible for the then prime minister, Indira Gandhi, to bring around the states involved in the Narmada Water Dispute – the states of Gujarat, Maharashtra and Madhya Pradesh – to agree to give a small share of the Narmada waters to a non-riparian state – the state of Rajasthan. An agreement was reached by all the four states on 23 February 1972, and an accord was signed by the chief ministers of each of the states (and counter-signed by the prime minister to underscore the importance of the centre's intervention). The Narmada Water Disputes Tribunal having held (in a preliminary decision) that Rajasthan, being a non-riparian state, was not entitled to a share in the Narmada waters, later altered its opinion in view of the written accord. As per Clause 3 of its final decision (12 December 1979), the state of Rajasthan was allocated 0.5 MAF (million-acre-feet)[4] of Narmada waters from the Sardar Sarovar Dam 'in the national interest'. This was allocated to the state of Rajasthan in terms of the chief ministers' accord for utilizing the same for irrigation and drinking purposes in the arid and drought-prone areas of Jalore and Barmar districts of Rajasthan (districts having no other available source of water) situated on the international border with Pakistan.

By way of contrast, after the 1990s when governments at the centre were 'weak' – coalition governments of several political parties with divergent policies – attempts by successive prime ministers to bring about an overall settlement in the Cauvery Water Dispute proved abortive.

The Narmada Dam, by now, would have reached its determined height of FRL (full reservoir level) 455 feet – one of the highest in the country – but problems associated with tardy resettlement and inadequate rehabilitation efforts on the part of the concerned states (Gujarat and then Madhya Pradesh) – of tribals and others located on the banks of the Narmada river – prompted India's Supreme Court to intervene, and to assume a monitoring role over the construction of the Sardar Sarovar Project – a role which the Supreme Court felt was mandated by the overriding humanitarian provisions contained in the life and liberty clause of the Constitution (Article 21).[5] The continuance of the Sardar Sarovar Project is being closely

supervised by the Supreme Court to ensure fair and just implementation of the tribunal's decision concerning rehabilitation. It is only now, after long years of disputation, that the project with a height of FRL 455 feet has been permitted to go ahead[6] – but presently only upto a height of FRL 400 feet (approximately). This is the price we must pay for a vibrant, though fractious, participatory democracy under a Constitution whose preamble emphasizes the supremacy of 'We the People'.

Contrast this with China's Three Gorges Project. In April 1992, the National People's Congress in Beijing approved the ambitious Three Gorges Project to tame the mighty and turbulent Yangtze river. Upon its completion, it will be the world's largest hydropower plant in terms of total installed capacity and annual power generation. It will also be the world's largest water conservation facility. But it will also inundate 653 square kilometres of densely populated areas of China – the largest area in the world to be inundated by a single man-made project! Inundation will affect more than 365 townships in 21 counties, cities or districts, and over one million people would have to be resettled. The Three Gorges Reservoir will also submerge 31,000 hectares of farmland and require the relocation of nearly 1,500 industrial and mining enterprises. Officials have reportedly said, 'In spite of preliminary success more difficulties are involved in the resettlement drive but we are optimistic about its final success.'

A couple of years ago, I asked a leading Swiss expert on dams, Raymond Lafitte, when he was visiting New Delhi,[7] what his view was on the Three Gorges Project. He thought for a while and said that it was a most laudable venture because after just two decades that it would take to build, commission and operate, 50 million people downstream would be able to cultivate their lands without flooding and be assured of regular releases. I asked him, 'What about the over one million people that have been deprived of their homes and have to be resettled elsewhere on account of this mega project?' And he replied, 'That is the price we must pay for future progress!' But what a price! I told the Swiss expert that the Three Gorges Project – beneficial as it is in the long run – can never be a possibility in India, under a democracy based on individual rights and freedoms.

The Chinese believe in the Benthamite principle of the 'greatest good for the greatest number' (a worthy principle in itself). In China, they believe in a rule-*by*-law regime, as contrasted with India's system of governance, which is rule-*of*-law. We, who cherish individual freedoms, have to undergo

the constraints and pangs of personal liberty – constraints that do not obtain in the People's Republic of China. It is no use saying that China is not democratic. Every country which prides itself as independent stresses, either in its name or in its Constitution, that it is democratic. A white paper recently issued by the information office in China emphasized this. It said, 'China is a Democracy in which the overwhelming majority of the people act as masters of state affairs. It is not a democracy of small numbers of peoples but an overwhelming majority of peoples' (notice the emphasis on the Benthamite principle).

One of the great challenges to our democracy is that we cannot possibly undertake, in the future, anything as grandiloquent as the Three Gorges Project or any other large beneficial irrigation and power project since this would involve enormous hardships in the present for large groups of people. This is because of our emphasis on individual citizen's rights, an emphasis that has somewhat transformed in recent years into an obsession. We live in the age of an all-pervading rights culture. Experience shows that a rights culture generates greater dissatisfaction amongst persons propounding different sets of rights. Too much emphasis on rights serves only to divide and fragment society and to spread discontent. Today, in India, we find ourselves in a stage of profound discontent, simply because we have forgotten our responsibilities towards one another.

It is useful to recall that when the UN Human Rights Commission was seeking views of eminent persons on a (then proposed) universal declaration of human rights, a questionnaire was circulated to various thinkers and writers of member-states of UNESCO (United Nations Educational, Scientific and Cultural Organization). They were asked, as individual experts, to give their views. One of them was Mohandas Karamchand Gandhi. He responded in a brief letter to Dr Julian Huxley, the director of UNESCO. The letter written in May 1947, in a moving train (those were troubled times – the days before India's independence), read:

> I learnt from my illiterate but wise mother that all rights to be deserved and preserved came from duty well done. The very right to live accrues to us only when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define the duties of Men and Women and correlate every right to some

corresponding duty to be first performed. Every other right can be shown to be a usurpation hardly worth fighting for.[8]

When we gave ourselves a Constitution, it was certainly good to provide rights enforceable against a state or state agencies. But I believe that it would have made a difference in our attitudes and our national consciousness if we had also stressed on the duties and responsibilities of citizens in one state towards citizens in another, such as the duty to share equitably the waters of an interstate river.

Although what is stated above is a digression, it is relevant for the purpose of emphasizing the difficulty in a rule-*of*-law country to have a satisfactory adjudication of interstate river water disputes. But we must try – as explained in the following chapter.

Notes and References

1. The Narmada Bachao Andolan

2. The last ICS (Indian Civil Service) judge; before his elevation to the Supreme Court in 1965, he was chief justice of Patna.

3. Article 136, special leave to appeal by the Supreme Court – (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. (2) Nothing in Clause (1) shall apply to any judgment, determination, sentence or order passed or made by any Court or Tribunal constituted by or under any law relating to the Armed Forces.

4. 1 MAF is equal to one feet of water on a million acres of land!

5. See *Narmada Bachao Andolan (NBA) vs Union of India*, 2000 (10) SCC 664, a bench decision of the Supreme Court consisting of three justices. Two of them (viz. Chief Justice Anand and Justice Kirpal) held that the construction of the Sardar Sarovar

Dam having been cleared in 1987 and a writ petition being filed only in 1994 to challenge the construction of the dam was highly belated. The third judge (Justice Bharucha) dissented and held that the writ petition having been filed during the process of relief and rehabilitation, the petitioners (NBA) were not guilty of any laches. All the three judges, however, held that on account of the Supreme Court's concern for the protection of fundamental rights of the ousters under Article 21 of the Constitution it was necessary to admit the writ petition and supervise the relief and rehabilitation measures – an ongoing process.

6. The state of Madhya Pradesh, though bound by the finality of the decision of the Ramaswami Tribunal, had contested before the Supreme Court the height of the Sardar Sarovar Dam as adjudicated in the tribunal's decision but the court has not so far accepted this plea. See *Narmada Bachao Andolan vs Union of India*, 2000 (10) SCC 662 (p. 767, paras 246–249).

7. He was appointed by the World Bank pursuant to the terms of Indus Water Treaty as the neutral expert to give his evaluation on the objections of Pakistan – to India's Baglihar Project on the Chenab river. I was requested by the prime minister to lead India's legal team at hearings before the neutral expert.

8. Cited in an address by Fedrico Mayor, director general of UNESCO, at the official opening of the International Literacy Institute at the University of Pennsylvania, Philadelphia, 29 November 1994 – DG/ 94/33 (p. 2).

Chapter 13

Can They Not Perform Better than They Do?

Change in the modus operandi of the functioning of interstate water dispute tribunals can only be achieved by a change in the mindset of members of the tribunal – who must not sit like umpires in a cricket match. Rather, they should emulate the referee in a football match – running with the 'players', all along participating in 'the game', though in a supervisory capacity! The act envisages an 'investigation' by the tribunal, not an adversarial proceeding like adjudication in a court of law.

I believe it was an error for us in India to have departed from the American pattern (the United States has a written Constitution like ours) to resolve interstate river water disputes. When conceived way back in the year 1956, the departure could perhaps have been justified as an innovative experiment – but the experiment has been a failure. I say this in the light of the experience gained in the now nearly 50 years of working of the Inter-State Water Disputes Act, 1956 (the ISWD Act). Its two-layered scheme makes for inordinate delay. First, a final decision is rendered under Section 5(2) of the act on the initial reference by the central government to the tribunal, and then a further reference under Section 5(3) of the act is provided for a state to question that decision for errors and omissions. One or more party states are permitted to seek explanation/guidance of the tribunal on points referred, and even on points not originally referred.[1] The result has been that water dispute tribunals when set-up, appear to last forever! Whilst they do provide gainful employment to a coterie of retired judges, and generate work for dozens of practising lawyers, there is no prescribed regime of how the work of a water dispute tribunal is to proceed. These water dispute tribunals, since they are not a part of the established judicial system in the country, have their sittings when they choose to have them. Day-to-day hearings or even week-to-week hearings are the exception, never the rule. They function uncontrolled (somewhat like private arbitral tribunals) outside the regular court system. The ISWD Act, 1956, was amended in 2002 to provide for a mandatory completion of the proceedings in a stated period of time (three years, extendable by further period not exceeding two years), but there is no monitoring of the work of these tribunals by the Supreme Court, and some of the tribunals have proceeded in a most lackadaisical manner.

The Ravi–Beas Water Dispute (between the states of Punjab and Haryana) arising from differences over the Longowal Accord of 24 July 1985, had been initially referred to a water dispute tribunal way back in 1986. Having gone about its task without let or hindrance (as the facile expression goes), the end is nowhere in sight, not even in the year of grace, 2010! The report of the Ravi–Beas Water Dispute Tribunal of 30 January 1987 under Section 5(2), which had been questioned in a reference under Section 5(3), has not been heard as yet!

A tenacious holding-on to positions, encouraged by human longevity and the loquacity and ingenuity of lawyers, combine to make the ISWD Act, 1956, a tiresome and exhausting adventure. Each tribunal adjudicating a particular water dispute referred to it becomes virtually a regime in itself, responsible to no one but the conscience of its own members, all of which projects a most unsatisfying picture of the working of this act.

The resolution of interstate water conflicts has always been a difficult problem, even in the United States. The US Supreme Court has often urged Congress 'to legislate solutions', and has urged the states to make use of the compact clause of the US Constitution.[2] The Delaware and Susquehanna River Basin Commissions are federal-interstate compact agencies with comprehensive powers to deal, not only with interstate conflicts, but with all other water resource management issues. These commissions were the first interstate compact agencies to include the federal government as a full-fledged signatory member. Inter-jurisdictional conflicts over the waters of interstate rivers have also spawned much litigation in the United States. The US Supreme Court is America's high court (its highest), exercising original jurisdiction (US Constitution, Article III, Section 2, Clause 2)[3] in disputes between states. It has adjudicated disputes on many interstate rivers – the Laramie, the North Platte, the Connecticut, the Delaware and the Colorado, to name a few. Original jurisdiction means that the US Supreme Court acts as a trial court, first taking evidence on factual questions (to be recorded by a special master) then making final determinations on both fact and law. The federal common law principle employed by the US Supreme Court in the resolution of water right suits between states is known as 'equitable apportionment'. Equitable apportionment is a label, not an analysis. The label describes the exercise that the court goes through to render a fair, just judgment as between two co-equal quasi-sovereigns. For this purpose, the court may draw on any number of water rights laws, rules of prior

appropriation, and federal or state statutes. Since the country's (USA's) Supreme Court is not equipped to act as a trial court, it must appoint a special master to hear the evidence and make recommendations both on fact and law. Invariably, multiple objections are filed to the special master's report that the court must ultimately sort out. In the end, the whole process does sometimes turn out to be an administrative nightmare for the court, compelling the US Supreme Court to strongly suggest the use of non-judicial forums for the resolution of interstate water right controversies viz. 'negotiation and agreement pursuant to the compact clause of the constitution'. In *Arizona vs California* (1964),[4] Justice Hugo Black had said:

> It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between States. But in those cases, Congress had not made any statutory apportionment … Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress.

In India there is no compact clause as in the US Constitution (Article 1 (10)). But the IWSD Act, 1956, does envisage agreements between states concerning the use, distribution or control of waters of an interstate river. 'Water dispute' is defined as meaning inter alia 'any dispute or difference between two of more states with regard to the interpretation of the terms of such agreement or the implementation of such agreement' (Section 2(c) (ii) of the Inter-State Water Disputes Act). States are thus enabled to enter into agreements regarding the sharing and allocation of waters of an interstate river, and more than 50 such agreements have been entered into between states over the years.[5] But they have mostly been in respect of minor rivers and streams. State politics being what they are, any voluntary limiting of the use of water in a major interstate river by one state so that another state can also utilize the same for irrigation or other purposes has become increasingly difficult. Only an imposed solution (it appears) can work. The Constitution does envisage in Entry 56 of List I (of the Seventh Schedule), the exclusive competence of Parliament to make laws with regard to the regulation and development of interstate rivers and river valleys – 'to the extent to which such regulation and development under the control of the

union is declared by Parliament by law to be expedient in the public interest'.[6] But the only enactment so far made by Parliament under this Entry is the River Boards Act, 1956. It has limited application because of a Section of that Act (S.2) which provides: 'It is hereby declared that it is expedient in the public interest that the central government should take under its control the regulation and development of interstate rivers and river valleys *to the extent hereinafter provided*.' The River Boards Act, 1956, contemplates the establishment of river boards but only for the purpose of 'advising the (state) governments interested' in relation to such matters concerning the regulation and development of an interstate river or river valley. When a dispute or difference arises between two or more states interested with respect to any advice tendered by the board or any measure undertaken by a government pursuant to any advice tendered by the board, then that dispute or difference has to be determined by the tortuous process of arbitration – the arbitration by a person appointed by the chief justice of India from persons who have been judges of the Supreme Court or of a high court; in other words, a judicially structured arbitration.

The River Boards Act, 1956, is not in essence a statute regulating the development of interstate rivers and river valleys. It is a law enabling river boards to be set up for rendering advice to state governments with respect to regulation and development of interstate rivers. At a time when the centre was 'strong' – and in the light of experience of the tardy working of the ISWD Act, 1956 – Parliament could have (and should have) taken under the control of the Union of India, the major interstate rivers in the country for integrated regulation and development of the entire region (irrespective of state boundaries). But it failed and neglected to do so. I do not envisage (in the near or even the distant future) our Parliament setting up (by law) river boards as they were meant to be constituted under Entry 56 of List I of the Seventh Schedule in the Constitution.

The blueprint of what such a board (if set up) could or would do was available before those who framed the Constitution of India. Many years before the 1950 Constitution, the report of the Indus Commission (Rau Commission Report Volume I) had set out authoritatively the three different views on the subject of the rights of states in respect of an interstate river. The first view was that every province or state has in virtue of its sovereignty or quasi-sovereignty the right to do what it likes with the waters within its territorial jurisdiction regardless of any injury that might result to

a neighbouring unit.[7] This view (the Rau Commission said) was against the trend of international law, and in any event, so far as India was concerned, was in conflict with the manifest intention of Section 130 of the Government of India Act, 1935[8] (a precursor to Section 3 of the ISWD Act, 1956).[9]

The second view was that the rights of riparian provinces or states should be determined by the common law principle which applied to individual riparian owners in England. Pushed to its logical conclusion, this principle enabled a province or state at the mouth of a big river to insist that no province or state higher up shall make any sensible diminution in the water which comes down the river.[10] This second view was also rejected by the Rau Commission.

A third view – the principle of 'equitable apportionment' was what was accepted and advocated by the Rau Commission viz. that every riparian state was entitled to a fair share of the waters of an interstate river. What was a 'fair share' must depend on the circumstances of each case, the river being for the common benefit of the whole community through whose territories it flows, even though those territories may be divided by political frontiers.[11]

The general principles suggested by the Rau Commission and accepted by all parties before it, were initially set out in the form of a juristic statement made by Sir Benegal Rau whilst adjudicating a complaint made by the Government of Sindh under Section 130 of the Government of India Act, 1935, relating to certain irrigation projects constructed or contemplated by the Government of Punjab on the Indus river and its tributaries. This statement is now the locus classicus of the 'law' on the subject. The statement reads:

> (1) The most satisfactory settlement of disputes of this kind is by agreement, the parties adopting the same technical solution of each problem, as if they were a single community undivided by political or administrative frontiers. (Madrid rule of 1911 and Geneva Convention, 1923, Articles 4 and 5)
>
> (2) If once there is such an agreement, that in itself furnishes the 'law' governing the rights of the several parties until a new agreement is concluded. (Judgment of the Permanent Court of

International Justice, 1937, in the Meuse Dispute between Holland and Belgium)

(3) If there is no such agreement, the rights of the several Provinces and States must be determined by applying the rule of 'Equitable apportionment', each unit getting a fair share of the water of the common river (American decisions).

(4) In the general interests of the entire community inhabiting dry, arid territories, priority may usually have to be given to an earlier irrigation project over a later one; 'priority of appropriation gives superiority of right' (*Wyoming vs Colorado* 259 U.S. 419, 470).

(5) For purposes of priority, the date of a project is not the date when survey is first commenced, but the date when the project reaches finality and there is 'a fixed and definite purpose to take it up and carry it through' (*Wyoming vs Colorado* 259 U.S. 419, 495; *Connecticut vs Massachusetts* 282 U.S. 660, 667, 673).

(6) As between projects of different kinds for the use of water, a suitable order of precedence might be (i) use for domestic and sanitary purposes (ii) use for navigation, and (iii) use for power and irrigation (*Journal of the Society of Comparative Legislation*, New Series, Vol. XVI, No. 35, pp. 6–7).

The precise criteria for an equitable apportionment are elusive. Each state is said to stand on an equal level.[12] This means that no state can impose its policies on another,[13] and that there must be an equitable division of benefits.[14] This does not mean, however, that there must be an equal division of interstate waters between the states through which they flow.[15]

The philosophical underpinnings of the principles of equitable apportionment had been restated by Justice Oliver Wendell Holmes in 1931 in the case of *New Jersey vs New York*,[16] decided by the US Supreme Court. In that case, New Jersey, the lower riparian, sought to enjoin New York from diverting waters of the Delaware river, its tributaries or headwaters, to

increase the water supply of New York City. In discussing the rule of law to be applied, Justice Holmes stated as follows:

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may. The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment *without quibbling over formulas*.[17]

The principle of 'equitable apportionment without quibbling over formulas' could well have been incorporated as the guiding factor for distribution and allocation of waters of every major interstate river in the country. But in the year 1956 when Parliament enacted the River Boards Act, it made a provision for the setting-up of virtually powerless river boards. This was despite the fact that one single party (the Congress Party) had dominated the Indian political scene both at the centre and at the states for more than 25 years after the promulgation of the Constitution of India, 1950. This was plainly a case of missed opportunities in the formulation and development of Indian Water Rights Law. After 1990, with patchwork coalition governments at the centre, and governments at the states having political combinations different from that of the centre, it has become more and more difficult to conceive of an effective River Boards Act being enacted by Parliament.

Absent the will of a fractured Parliament to amend the River Boards Act, 1956, or enact a fresh law under Entry 56 of List I of the Seventh Schedule of the Constitution to truly make regulation and development of an interstate river a matter of national concern, there is no escape from the present situation of a long-drawn 'adjudication' of interstate river water disputes. *The question is only how best can such an adjudication be achieved.*

The principle of 'equitable apportionment' has been recently reiterated by the Supreme Court of India in a presidential reference (1991).[18] The reference was occasioned by the state of Karnataka enacting a law purportedly under Entry 17 of List II[19] (water …) of the Seventh Schedule of the Constitution to enable the state, in effect to override an interim order passed by the Cauvery Water Disputes Tribunal, and reserving to the state of Karnataka (the upper riparian state) to decide the quantity of water to be appropriated by it even during the pendency of an adjudication of the water dispute before the Tribunal! The validity of this law was questioned by the state of Tamil Nadu. This occasioned the presidential reference in India's Supreme Court. In a unanimous judgment of a five-judge bench, the state legislation was struck down as beyond the legislative competence of the state. The court said that legislation on 'flowing waters', of an interstate river like the Cauvery, was not an exclusive state subject. In saying so, the Supreme Court quoted extensively from the leading American case, *Kansas vs Colarado* (known as the *Grandfather River Case*). The Supreme Court of India said that absent agreement between the states as to how the waters of an interstate river are to be shared, the only legitimate method was by 'adjudication' under the Inter-State Water Dispute Act, 1956. Our Supreme Court reiterated 'the true legal position' (that had been already expounded so succinctly by the Rau Commission way back in the year 1942) in the following words:

> 71. It will be pertinent at this stage also to note the true legal position about the inter-state river water and the rights of the riparian States to the same. In *State of Kansas vs State of Colorado* ((1907) 206 U.S. 46) the Supreme Court of the United States has in this connection observed as follows:
>
> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none … the action of one State reaches, through the agency of natural laws, into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute

> between them and this Court is called upon to settle that dispute in such a way as will recognise the equal rights of both and at the same time establish justice between them.

The dispute is of a justiciable nature to be adjudicated by the Tribunal and is not a matter for legislative jurisdiction of one state …

> The right to flowing water is now well settled to be a right incident to property in the land; it is right publici juris, of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land, and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down …[20]

Since there are now established legal principles governing apportionment of waters of an interstate river, the decision of a court or a tribunal adjudicating the rights of the people in one state vis-à-vis the people in another state must follow 'a strict and complete legalism': a phrase of Sir Owen Dixon, when he assumed office as chief justice of Australia on 21 April 1952. He stated how federal conflicts (between states) must be decided …

> Federalism means a demarcation of powers and this casts upon the (High) Court a responsibility of deciding whether legislation is within the boundaries of allotted powers … It is not sufficiently recognized that the Court's sole function is to interpret … and that it has nothing whatever to do with the merits or demerits of the measure. Such a function has led us all I think to believe that close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.[21]

India is a federal, or at least a quasi-federal state.[22] Accordingly, it is legitimate to expect that there must be close adherence to legal reasoning in all interstate disputes, including interstate river water disputes, but a 'strict and complete legalism' is best left to the country's highest court. This is one reason why I am of the view that the function of adjudication of interstate water disputes must only be by the Supreme Court of India under Article 131[23] of the Constitution – without the constraints of Article 262 (read with the ISWD Act, 1956).

The experience of the working (often 'non-working') of a succession of water dispute tribunals makes it imperative that the Inter-State Water Disputes Act, 1956, be repealed. And just as all other disputes between states are left to be decided only by original suits filed in India's Supreme Court (Article 131), so also interstate water disputes should be left to be decided directly by the country's highest court. Recording of evidence and findings on fact and law may well be delegated to a senior retired judge of the Supreme Court, aided and assisted by assessors. But the 'investigation' into the water dispute by such a retired Supreme Court judge ought not to be fettered by legal arguments and stratagems of lawyers representing the states. Of course lawyers may represent the states before the special judge (or master) but their contribution should be limited to strictly legal questions which may arise at the end but not at the beginning. The doctrine of 'equitable apportionment' is a doctrine of equity. It entails a host of factors to be taken into account.[24] The data and its interpretation is a matter to be left to experts and engineers but the application of the equitable doctrine is always the subject of legal argument and legal decision. The technicalities of the actual allocation of the waters of a river are better left to the province of the scientist, the engineer and the economist who possess necessary specialized knowledge, which the lawyer lacks. The lawyer is useful in the formulation of principles and their application to the case at hand.

My own experience in the Cauvery Water Disputes Tribunal has been that if the chief engineers of Karnataka, Kerala and Tamil Nadu had been assembled to sit across the table with the chairman (and members) of the tribunal, it would have been possible to narrow differences and save a great deal of time. The decision as to how the differences were to be narrowed (of course) would have had to be left to the good sense of the tribunal and not to the engineers. The engineers had to be put at ease so that they did not

have to keep looking over their shoulders (to their masters, the state) when explaining technical aspects – lawyers of the party states being kept on hold to be heard at the end on legal points that arose, but not on how wastages were to be prevented; on how much or how little water was actually required by each state; or on how the cropping patterns in one state or the other should be altered having regard to advances in modern technology, etc.

The advantage of relegating all disputes, including water disputes, to the mechanism of Article 131 would enable a non-elected but supreme non-political body (India's apex court) to decide in a fair and non-partisan manner – all contentious water disputes between states, just as it is entrusted with the task of deciding all other disputes between states including land boundary disputes, etc., if for no other reason than that a decision of the highest court of India is constitutionally final.

Much as I accept the view that 'legal reasoning' is the sure guide in interstate conflicts, including differences about allocation of the waters of an interstate river, and much as I am conscious of the fact that trained lawyers are able to help courts and tribunals come to a just conclusion on such conflicts, there is one caveat: in the adjudication of interstate water disputes, the role of the lawyer, though crucial, is a role at the periphery of an adjudication rather than in the thick of it.

My conception of the role of lawyers being at the periphery of an adjudication rather than in the thick of it is prompted by my recent experience in the case concerning the Baglihar Hydroelectric Dam, a run-of-the-river plant on the Chenab, a tributary of the Indus River – 'Differences' arose between India and Pakistan regarding the design of the Baglihar Plant, the quantum of pondage and the positioning of intakes of turbines for the plant, etc., and the differences between India and Pakistan were referred under the provision of the (Indo-Pak) Indus Water Treaty, 1960, to a neutral expert appointed by the World Bank. The neutral expert was an engineer, not a lawyer or a judge. In all, five week-long meetings took place. The first two meetings covered site visits, and pleadings and questions posed by the neutral expert. In a crucial third meeting, each party state made its oral and video presentations (over days, not weeks!) at which questions were permitted to the representatives of the states and answers recorded. In the fourth meeting, the neutral expert presented a Final Draft Determination for consideration of the parties, and in the fifth meeting, the

party states offered comments on the Final Draft Determination. The neutral expert, himself a world authority on dams, made his own assessment and then gave his Final Determination on 5 February 2007.

Lawyers representing both sides made brief legal submissions lasting not more than a couple of hours – first at the beginning and then at the end of each week-long meeting. The engineers and experts were the main spokesmen and the principal dramatis personae. They were always at centre stage. Other important aspects were that complete records of meetings were made in the form of both written transcripts and video recordings. Procedural decisions were then recorded in minutes invariably by consent of parties, and representatives of the party states were asked to sign the agreed minutes.

I suggest that this refreshing way of proceeding – initiated by the Swiss neutral expert in the Pakistan–India dispute – should be emulated by tribunals constituted under the Inter-State Water Disputes Act, 1956.

As to how interstate water disputes should be expeditiously resolved, I do offer some suggestions – both, for the long term and the short term:

(1) *In the long term*: I would suggest, whilst not disturbing the provisions of Article 262, which are only enabling, the Inter-State Water Disputes Act, 1956, should be repealed by Parliament – at least as an experimental measure. As a consequence, all disputes between states – including water disputes – would have to be adjudicated only by the Supreme Court of India under the provisions of Article 131 of the Constitution. Under its rule-making power (Article 145 of the Constitution), the Supreme Court could then make rules for the better adjudication of such water disputes, on the American pattern.[25]

A senior retired justice of the Supreme Court or a senior chief justice of a high court having experience of pushing cases to speedy and successful conclusions should be appointed special master or a special judge. The choice of the right person is extremely important. It helps to achieve the end result without much delay. The special judge or special master, after taking on board all the documents filed by the party states, and after ascertaining from the technical experts and engineers the

salient features, must then call in the lawyers to discuss the legal questions that arise. The attempt to arrive at the resolution of the dispute or even a decision on the matters at issue must not resemble a proceeding in a court of law – an adversarial proceeding – but an investigative proceeding. A useful precedent was the one that was devised by the Bachawat Tribunal (the Krishna Water Disputes Tribunal, KWDT–I) when its members directly discussed the technical aspects involved with the engineers of the respective parties without at first seeking any assistance from legal representatives of the party states.

(2) *In the short term* (or alternatively, if the Inter-State Water Dispute Act, 1956, is to remain on the statute book with prescribed outer time limits as mentioned in the 2002 amendment): I would recommend the following:

(a) The tribunal must be (seated) at the same level as all other persons appearing before it including counsel and engineers. The raised rostrum for the water dispute tribunal gives the impression to one and all (particularly its members) of an adversarial court proceeding which is psychologically inappropriate. The mindset of tribunal members, lawyers, engineers and participants must be so conditioned so as to gather all necessary information with as little formality as possible, so that the tribunal reaches an informed decision on the points required to be decided.

(b) The chairman of the tribunal along with the members must, on an almost continuous basis, caucus[26] (discuss) with the engineers and technical experts on each side, preferably keeping lawyers in the background so that the tribunal acquaints itself with all the finer technical points at issue in the case. Of course this would be after presentations are made by the technical experts on each side.

(c) Adversarial form of recording of evidence (as in a court of law) must be avoided viz. the rigmarole of examination-in-chief (or its poor substitute – an affidavit in support) of every witness, the cross-examination of that witness and his (her) re-examination, as in a proceeding in a court of law is definitely not the

recommended mode of proceeding under the 1956 Act.[27] There should be a presentation by the experts on each side with the right to any person or party to question that expert on any given point, the tribunal retaining a close control over the questioning and the range of permissible questions.

(d) After the presentations are made, the lawyers could usefully sum up and give an analysis of the documentation on record and point to relevant conclusions.

(e) This change in the modus operandi of the functioning of interstate water dispute tribunals can only be achieved by a change in the mindset of members of the tribunal – who must not sit like umpires in a cricket match. Rather, they should emulate the referee in a football match – running with the 'players', all along participating in 'the game', though in a supervisory capacity! The act envisages an 'investigation' by the tribunal, not an adversarial proceeding like adjudication in a court of law. Yet, successive tribunals have conducted proceedings under the 1956 Act invariably sitting on a raised dais as if they were deciding a case in a court of law. The manner in which the Bachawat Tribunal (1969–1978)[28] conducted its proceedings (in the First Krishna Water Disputes Tribunal, KWDT–I) was exemplary and worthy of emulation. Having appointed no assessors to assist it, the members of this tribunal (all judges) sat across the table with experts and engineers understanding the technical points and discussing with them the problems and the difficulties, making their own notes as they went along. Then when they came to certain tentative conclusions on certain points they called upon advocates for the states to agree on relevant factual matters, and made a note for the record that parties had agreed to such and such: this considerably shortened the need for an 'adjudication' save an except on the most material points.[29]

One last word on this subject; whilst discounting the predominance of the role of lawyers in interstate water dispute adjudication, I must, however, emphasize the paramount importance of legal training. It is of great use in whatever activity that a lawyer or a judge is propelled into. He or she (being so trained) is able to differentiate between and to separate the 'wheat' from

the ‘chaff’ – a facility not readily found in individuals, howsoever intelligent, who have no legal training. In interstate water disputes, the views of experts (scientists, qualified technical persons, economists, etc.) have to be listened to and heard, but what they propound does not necessarily have to be accepted. In the end, the accumulated wisdom of an experienced legal mind – wisdom gathered over the years – enables a ‘good’ tribunal to see through the presentation and form its own conclusions. As the world-famous nuclear physicist, Niels Bohr always used to say (describing himself with characteristic humility): ‘An expert is a man who has made all the mistakes which can be made in a very narrow field!’

Notes and References

1. Section 5 of the 1956 Act reads as follows:

5 (1) When a tribunal has been constituted under section 4, the central government shall, subject to the prohibition contained in section 8, refer the water dispute and any matter appearing to be connected with, or relevant to, the water dispute to the tribunal for adjudication.

(2) The tribunal shall investigate the matters referred to it and forward to the central government a report setting out the facts as found by it and giving its decision on the matters referred to it within a period of three years:

Provided that if the decision cannot be given for unavoidable reasons, within a period of three years, the central government may extend the period for a further period not exceeding two years.

(3) If upon consideration of the decision of the tribunal, the central government or any state government is of opinion that anything therein contained requires explanation or that guidance is needed upon any point not originally referred to the tribunal, the central government of

the state government, as the case may be, within three months from the date of the decision, again refer the matter to the tribunal for further consideration, and on such reference, the tribunal may forward to the central government a further report within one year from the date of such reference giving such explanation or guidance as it deems fit and in such a case, the decision of the tribunal shall be deemed to be modified accordingly:

Provided that the period of one year within which the tribunal may forward its report to the central government may be extended by the central government, for such further period as it considers necessary.

(4) If the members of the tribunal differ in opinion on any point, the point shall be decided according to the opinion of the majority.

2. Except for the single limitation that the consent of Congress must be obtained, the original inherent sovereign rights of the sates to make compacts with each other were not surrendered under the US Constitution. 'The Compact,' as the US Supreme Court has put it, 'adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations … Private rights may be affected by agreements for the equitable apportionment of the water of an interstate stream, without a judicial determination of existing rights.'

3. 'Clause 2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.'

4. 376 US 340 – 11 L Ed. 2d 757 (1964)

5. They are set out in a book called *Legal Instruments on Rivers in India (Agreements on Inter-State Rivers)* (1995), Volume 3, Central Water Commission (Inter-State Matters Directorate), New Delhi.

6. Article 246 (1) – '246. Subject-matter of laws made by Parliament and by the Legislatures of States – (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List".' Entry 56 of List I (the Union List) reads: '56. Regulation and development of inter-state rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.'

7. Prior to 1892, the Princely State of Mysore (now Karnataka) had asserted its rights to the flowing water in the Cauvery river based on the Harmon Doctrine. But the British resident in Mysore (the representative of the viceroy) rejected this assertion. Claiming to exercise 'paramount power', he ruled that anything that harmed the British interests (including the Province of Madras) would not be countenanced.

8. '130. If it appears to the government of any governor's province or to the ruler any federated state that the interests to that province or state, or of any of the inhabitants thereof, in the water from any natural source of supply in any governor's or chief commissioner's province or federated state, have been, or likely to be, affected prejudicially by:

(a) any executive action or legislation taken or passed, or proposed to be taken or passed; or
(b) the failure of any authority to exercise any of their powers, with respect to the use, distribution or control of water from that source, the government or ruler may complain to the Governor-General.'

9. Section 3 of the ISWD Act, 1956, provides:

> 3. Complaints by state governments as to water disputes – If it appears to the government of any state that a water dispute with the government of another state has arisen or is likely to arise by reason of the fact that the interests of the state, or of any of the inhabitants thereof, in the waters of an inter-state river or river valley have been, or are likely to be, affected prejudicially by:
>
> (a) any executive action or legislation taken or passed, or proposed to be taken or passed, by the other state;
> (b) the failure of the other state or any authority therein to exercise any of their powers with respect to the use, distribution or control of such waters; or
> (c) the failure of the other state to implement the terms of any agreement relating to the use, distribution or control of such waters.

10. This was the rule followed by the British-Indian Province of Madras in relation to the Cauvery waters located in the upper riparian state – the Princely State of Mysore. In a letter dated 13 June 1889, the direction of the British Resident in Mysore, Sir Oliver St John was conveyed to the government of Mysore. In this letter, paramountcy was claimed over the feudatory state of Mysore and the principle for determining the rights of the Province of Madras over the waters of the Cauvery river was stated in the following peremptory terms:

> Sir Oliver St. John desires me to point out that he cannot accept the contention that 'under the law and custom of all nations, Mysore has the right to utilize to the fullest extent the natural water courses flowing through its territory'. It is presumed that by the law and custom of all nations, international law is meant. In the first place international law is not applicable to a feudatory state like Mysore in its dealings with the paramount power. Even if it were so, international law would not give Mysore the right claimed. Its position with reference to Madras territory is something similar to that of Switzerland towards northern and western Europe, and it could hardly

be contended that the Swiss Republic would be permitted by international law to divert the waters of the Rhine into the Rhone or vice-versa and to destroy the main artery of inland navigation of Germany or France. Yet this is more than is claimed for Mysore by your secretary's letter. The principle which should be taken as your guide in this important question is that no scheme for stopping the flow of water from Mysore into Madras territory will be permitted if it can be shown to be detrimental to the interests of the latter (emphasis supplied).

11. See paras 50, 51 and 52 of the Indus Commission Report, pp. 32–33

12. *Kansas vs Colorado*, 206 U.S. 46 (1907), pp. 97–98

13. Ibid., pp. 97–98

14. Ibid., pp. 117–118

15. *Connecticut vs Massachusetts*, 282 U.S. 660, 670 (1931); *Wyoming vs Colorado*, 259 U.S. 419, 465 (1922)

16. 283 US 336 (1931)

17. Ibid., pp. 342–343

18. 1993 (Supp. 1) SCC 96

19. Entry 17 of List II of the Seventh Schedule of the Constitution reads:

17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List-I.

Note: All matters falling in List II of the Seventh Schedule are within the exclusive competence of the state legislature. Inter Article 246 (3)

of the Constitution which reads as follows:

(3) Subject to clauses (1) and (2), the legislature of any state has exclusive power to make laws for such state or any part thereof with respect to any of the matters enumerated in List-II in the Seventh Schedule (in this Constitution referred to as the 'State List').

20. Re: Cauvery Water Disputes Tribunal 1993 (Suppl. 1) 96, pp. 138–139

21. 85 Commonwealth Law Reports (1952) XI, pp. xiii–xv

22. See *State of Karnataka vs UOI*, 1977 (4) SCC 608, p. 648

23. Article 131 – Original jurisdiction of the Supreme Court: Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute:

(a) between the Government of India and one or more States; or
(b) between the Government of India and any State or States on one side and one or more other States on the other; or
(c) between two or more States,

if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends (provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, *sanad* or other similar instrument which, having been entered into or executed before the commencement of this Constitution), continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.

24. Equitable share of a state is to be determined in the light of all the relevant factors in each particular case, which should include (but not limited to) the following: (i) Geography, population,

hydrology and climate; (ii) Past or existing utilizations and agreements; (iii) Proposed or planned utilizations; (iv) Socio-economic needs or each basin state; (v) Alternate resources, conservation, avoidance or unnecessary wastage; and (vi) Degree to which the needs of a riparian state may be satisfied without causing substantial injury to a co-riparian state.

The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors, and in determining what is a reasonable and equitable share, all factors are to be considered together and an informed conclusion reached on the basis of the whole.

25. See *American Jurisprudence* – Volume 32A (1982), para 572, wherein it is stated: 'If an original case raises factual questions which require an evidentiary hearing for their resolution, the Supreme Court may refer it to a Special Master. Such a reference is not required, however, if no issues of fact are raised, no evidence need be taken, and the parties desire an expedited ruling on a question of law. It should also be noted that while the Supreme Court may call on the aid of a master to hold evidentiary hearings, this may not fully relieve the Court of the burdens presented by a complex case, since the Court still retains the ultimate responsibility to approve or reject the master's findings and fashion appropriate relief.

Accordingly, if a District Court also has jurisdiction over a matter, the Supreme Court may refer it to a district judge, who may be in a better position to fashion a decree which can then be reviewed by the Supreme Court in the exercise of its appellate jurisdiction. A typical order of reference (to the Special Master) may provide that the special master has authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, with authority to summon witnesses, issue subpoenas, take evidence, and submit such reports as he may deem appropriate. Motions to intervene may also be referred to a master. The master then takes evidence and files a report. The master may also refer questions of law to the court and propose conclusions of law. Exceptions may then be filed to the master's

report and such exceptions are then considered by the court. The court may then enter a decree, or direct the parties to prepare and file decree. If the parties cannot agree on a decree, the matter may be referred back to the master for appropriate proceedings and further recommendations.'

26. Caucusing is a term used in arbitration – where the arbitrator initially acts as a mediator or conciliator. He (or she) 'caucuses' – meets with the parties – individually (or collectively).

27. Cross-examination of witnesses before the Cauvery Water Disputes Tribunal – a cross-examination permitted without any intervention by the tribunal – was exhausting. Witnesses on each side were cross-examined by counsels representing party states. Since the Cauvery Water Disputes Tribunal did not sit on an average for more than seven days a month, the cross-examination of witnesses dragged on and on for four long years! Much of the oral evidence turned out to be not very useful – documentary evidence was of paramount importance.

28. Justice R. S. Bachawat was a judge of the Supreme Court of India and chairman of the Krishna Water Disputes Tribunal (KWDT-I). I recall that when on the court he encouraged counsel to be brief and to present arguments 'in capsule form' (as he always used to put it).

29. I am indebted for this useful piece of information to Senior Advocate Sharad S. Javali who had appeared as counsel before the Bachawat Tribunal.

Chapter 14

About Some Judges of the Supreme Court

Judges are human beings, and human beings, like stars in the firmament, have blemishes. Despite such blemishes they shine.

I think I can claim to have appeared before all (or almost all) judges who have sat in the highest court since 1 May 1972 (the day I moved to Delhi), and a few of them (like Justice Subba Rao and Justice Hidayatullah) even before, on some infrequent appearances in the Supreme Court. I consider myself singularly fortunate to have known what I would describe as the Subba Rao era, and to have lived through the Krishna Iyer era for they were important turning points in my career. I can unhesitatingly say that I am a better constitutional lawyer for having lived through these two great periods of our legal history.

In the course of my long professional career I have appeared before judges – of the high courts and of the Supreme Court – some of them excellent, some good, some not so good, some pompous, some courteous, some wooden-headed.

About the *wooden-headed* I recall what Vishwanath Sastri, a lawyer who had a most fertile and receptive mind, once told me. When I was a junior at the Bombay Bar, I had the privilege of being briefed along with him in a few cases in the Supreme Court. The client would send me and the solicitor off to Delhi from Bombay to have a conference with Sastri. But there was nothing we could tell him about the case that he did not already know. I made it a point to work very hard on the brief when I was his junior; but there was nothing that I could contribute that Sastri did not already comprehend! His mind was a storehouse of legal knowledge, and his conferences (like the conferences of Jamshedji Kanga) never lasted for more than 30 minutes. At one such conference in a somewhat relaxed mood, Vishwanath Sastri asked me in his simplistic sing-song voice, 'Ah – you are from Maharashtra. I appeared the other day in the Allahabad High Court before a judge from your state …' at which I politely asked him, 'And what did you think of him Sir?' And he shook his head and quite

innocently said, '*Ah – nothing entered his head*.' This may or may not have been true but it was Vishwanath Sastri's description of the judge's mental capacity which always made me sceptical, from then on, of judgments of that particular judge!

There have been in the past a few slightly ridiculous judges as well. And for the following story I am indebted to the late Justice Dhirubhai Desai, when he was a judge of the Supreme Court. A junior colleague of his (who shall be nameless) in the highest court had gone to some place in Rajasthan on an official visit, and the representatives of the Bar in that city called on the visiting Supreme Court judge, requesting that he should join them for a dinner in his honour, to which the judge testily responded, 'Put it in writing, put it in writing.' The lawyers withdrew, went outside, and with trepidation wrote a small petition beginning with 'May it Please Your Lordship …' and put in writing the invitation for dinner. With consternation, they took it back to the judge who took the paper from them and instantly wrote in the margin the word 'rejected'. Being so used to rejecting special leave petitions, this judge also thought that a dinner invitation was to be treated in like manner!

But with these two frivolous stories, let me say quite seriously that (since 1950) there have been three types of judges who have occupied places in the highest judiciary of this country. First, judges with a political agenda. Second, judges with a social agenda. And third, judges without an agenda. I consider it significant for the development of the law that judges in the third category have been the most numerous. The reason is the same as that given (long ago) by an English judge when speaking about Lord Denning. He likened Denning to a great Oak tree, and then added that the reason why his country was so proud of him was because it simply would not do to have too many of them! If all judges of the Supreme Court of India had a political agenda and gave vent to their views (as Justice Subba Rao did) or if all the judges of our apex court had a social agenda and fashioned their judgments accordingly (as Justice Krishna Iyer did), there would have been a massive public outcry. But it is because judges with an agenda are few in number that they are long remembered.

There is a constellation in the Northern Hemisphere which is only visible in winters – astronomers call it Ursa Major; more popularly known as the Great Bear. The constellation includes seven bright stars. In Indian

astronomy, these stars represent the seven rishis – the *Saptarshi* – but two of them are pointers. They show the path, i.e., they point to the Pole Star.

In the judicial firmament during these past 50 odd years, there have been many bright and brilliant stars. Many of them have written judgments lucid and learned – the judgments of Justice Vivian Bose, Chief Justice S. R. Das, and the judgments of the brilliant and versatile Justice P. B. Gajendragadkar adorn the law reports. It is a tribute to these judges that some of their judgments are still read for instruction and pleasure. But the pointers – the pathfinders – have been a handful and I can name only two – Justice K. Subba Rao and Justice V. R. Krishna Iyer. Each was different. They, above all others in the decades of the 1960s, 1970s and 1980s, influenced creative judicial thinking. They lighted new, difficult (and different) paths – paths which others followed.

When Professor Arthur Goodhart died in 1975, completing 50 years as editor of the *Law Quarterly Review*, Lord Diplock wrote of the enormous influence he had on those who had comprised so large a part of the higher judiciary of England. Lord Diplock said that Professor Goodhart had, over the years, 'altered the habits of the mind of judges'. The practice of the law in India with its reliance upon precedent had, in the first decade of the Supreme Court, induced an ingrained resistance to change, not least amongst those who practised the law long enough to attain the highest judicial office. K. Subba Rao and V. R. Krishna Iyer were different. They are two outstanding examples of judges who in different ways influenced and altered 'the habits of the mind of judges' – the judges of the 1960s, 1970s and 1980s.

The influence of Subba Rao began with his appointment as a judge of the Supreme Court in January 1958, though paradoxically, as a puisne (junior) judge of the court, he was also its most frequent dissenter. The Subba Rao era began with his short but vigorous tenure as chief justice from 29 June 1966 till 11 April 1967, when he resigned to contest (unsuccessfully) for the office of the president of India. Presiding over the Constitution Bench in that brief period of ten months as chief justice, decisions in as many as 62 different cases were handed down, almost all important constitutional cases. Sixty of the 62 judgments delivered by the Constitution Bench presided over by Subba Rao in that brief ten-month period were unanimous decisions – a rare example of firm judicial leadership.

Of the remaining two judgments, in the first, Subba Rao presided over a bench of nine securing a majority (of 8:1) for his point of view;[1] the other, in the celebrated *Golaknath* case (1967), where I was privileged to appear as junior to both A. K. Sen and Nani Palkhivala, he presided over a full bench of 11 judges. His judgment concurred in by Justice Hidayatullah (who delivered a separate opinion) was the judgment of the court. He had secured a majority for his point of view, though a narrow one (6:5).

Those who sat with him have frankly confessed that they were not only impressed by his ability and intellect, but they were also greatly moved by his innate courtesy and his keenness to persuade. The impetus for change after all depends on the personal persuasion of someone who is accepted as a respected colleague. That influence can never be lasting if it is obtrusive. Persuasion is more successful when it creates a mental atmosphere receptive to change. Subba Rao created that atmosphere (as did Chief Justice Venkatachaliah much later – February 1993 to October 1994).

Chief Justice S. R. Das, on his retirement in September 1959, made an amusing farewell speech which was published in the law reports. About 'Brother Subba Rao'[2] he was particularly jocular – (after referring to some of his other colleagues in a lighter vein) he went on:

> Then we have Brother Subba Rao who is extremely unhappy because all other fundamental rights are going to the dogs on account of some misconceived judgments of his colleagues which require reconsideration.

The serious bit in this piece of frivolity was that Brother Subba Rao did sincerely believe in what he was later to describe as the 'transcendental nature' of fundamental rights. He genuinely believed that many decisions interpreting various provisions in Part III of the Constitution in the first decade of the Supreme Court were retrograde. In his seven years on the bench, more than six of them as a puisne judge, he did his utmost to undo them. In the early years when he couldn't, he dissented. In later years, when he could muster a majority for his views, he gladly affirmed his previous dissents which then became the law of the land!

In all spheres of the law, particularly in matters pertaining to constitutional law, he was the one who was the most articulate. He was rarely content with joining in the majority opinion – even when he

concurred with the majority he expressed his view. The number of his concurring opinions was well above the norm. He wrote the largest number of dissents – judgments in as many as 49 different cases dissenting from the majority. Contrast this with six justices of his time who never wrote a single dissent, and another six, each of whom only contributed a single dissent! The clarity and quality of his judgments bear testimony to the great impact he had on his colleagues. Justice J. M. Shelat once said to me (after his retirement) that both he and Justice J. C. Shah were greatly influenced by Subba Rao. His concern for fundamental rights and his distrust of parliamentary majorities led to some of his most controversial decisions. He abhorred absolute power – especially the arrogance of absolute power – whether exercised by an executive administrative agency, or when exercised through the legislative process. He did not stop short even at questioning the validity of the exercise of constituent power.

In the *Kharak Singh*[3] case – which dealt with a police regulation authorizing domiciliary nocturnal visits to the houses of alleged disreputable characters – he showed the way for the first time for a broader interpretation of Article 21 of the Constitution. 'The petition,' he said, 'raises a question of far-reaching importance – the right of every citizen of India to lead a free life subject to social control imposed by valid law.' He was not deflected (as was the majority) by the fact that the question had been raised at the instance of an alleged disreputable character (Kharak Singh had a long criminal history-sheet). 'If the police could do what they did to the petitioner,' said Subba Rao, 'they could also do same to an honest and law-abiding citizen.' He held that the expression 'life' in Article 21 could not be confined only to the prohibition against the taking away of life. 'It inhibits against its deprivation,' he said, 'but it is also extended to all of those limbs and faculties by which life is enjoyed.' Mark you, 'faculties by which life is enjoyed' heralding and anticipating the later liberal sweep of Article 21 as interpreted in the Krishna Iyer era; so with the word 'Liberty', also in Article 21. The right to personal liberty is not only a right to be free from restrictions placed on a citizen's movements, (he said) it also encompasses freedom from encroachment on his private life.

It was argued for the state that the fundamental right to freedom of movement meant only that a person could move physically from one point to another without any restraint. Justice Subba Rao rejected this as unacceptable in a free society:

> If a man is shadowed, his movements are obviously constricted. He can move physically, but it can be a movement of an automaton. How could a movement under the scrutinizing gaze of the policemen be described as a free movement? *The whole country is his jail*. The freedom of movement in clause (d) (of Article 19) therefore must be a movement in a free country, i.e., in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom.

Witness the contemptuous characterization of the argument for the state in a few simple devastating words – 'The whole country is his jail!' Years later, long after Subba Rao ceased to be on the court, a bench of three judges (Justice Mathew, Justice Krishna Iyer and Justice Goswami) inspired by this dissent held in *Gobind vs State of M. P.*[4] that there could be no doubt that the makers of our Constitution wanted to ensure to its citizens conditions favourable to the pursuit of happiness and that they must be deemed to have conferred upon the individual (as against the government) a sphere where the individual should be let alone. The dissent in *Kharak Singh* had pointed the way. The later decision in *Gobind* followed – affirming the constitutional right of the individual to be left alone – giving to the right of privacy a small but secure foothold in the chapter on fundamental rights.

Till Subba Rao became chief justice, the English rule in India was that the state was not bound by a statute unless the statute so provided. This was based on the doctrine of crown immunity, 'The King can do no wrong', from which it followed logically (it was thought) that the state could do no wrong. This was affirmed by a bench of seven judges in 1960.[5] Subba Rao, though on the court at that time, was not a party to this decision. Shortly after he became chief justice, he set up a bench of nine judges[6] to consider the correctness of the prior decision in *Director of Rationing vs Corporation of Calcutta*. He persuaded eight of his colleagues on the bench that the English common law theory was subversive of the rule of law, and that it had been given up even in England after the enactment there of the Crown Proceeding Act, 1947. It could not be permitted under the Constitution of India. The facts of that case were simple. The state of West

Bengal (in other words, the government of West Bengal) was carrying on the business of running a market. Section 218 of the Calcutta Municipal Act required every person carrying on trade to hold a licence. The government of West Bengal contended that it was not bound by the provisions of the Act, since the Act did not expressly include the state. The Supreme Court held that the state was as much bound as a private citizen to take out a licence. The earlier decision (of seven judges) was overruled. The thrust of the later Subba Rao decision in which eight of his colleagues concurred was clear – 'Howsoever high you be, the law is above you.'[7] That message had a great influence on later judgments of the Supreme Court on administrative law, and on the supremacy of the judiciary in testing the validity of all executive and legislative action.

Soon after he joined as a member of the court, a decision was handed down in September 1958 – *Radhyeshyam Khare vs State of M. P.*;[8] Justice Subba Rao dissented. In his forceful dissent he held that it was obligatory for every administrative body to comply with the rules of natural justice. In that case, a local municipal committee was superseded on the ground that it was not competent to perform the duties imposed on it by the Municipal Act. The majority held that no opportunity needs to be given to the affected parties before action was taken, since the principles of natural justice only applied when there was a duty to act judicially. Subba Rao did not agree. It shocked his concept of fair play. He said:

> The finding of incompetency carries a stigma with it and what is more derogatory to the reputation of the members of the Committee than to be stigmatized as incompetent to discharge their statutory duties? Would it be reasonable to assume that public men in a democratic country are allowed to be condemned unheard?

At that time this was a voice in wilderness! But the powerful dissent influenced later judgments in *A. K. Kraipak*[9] (where it was held that principles of natural justice were not excluded where purely administrative action was involved), as also in the much later Constitution Bench decision in *S. L. Kapoor vs Jagmohan*[10] (where it was held that the principle of *audi alteram partem* applied to municipal committees which had been superseded on account of their alleged defaults).

A year before he became chief justice, Subba Rao presided over a Constitution Bench decision[11] concerning conditions of detention of those preventively detained. One Prabhakar Sansgiri had been detained under the Defence of India Rules, 1962. He had written a book during the period of his enforced idleness. It was a book in Marathi called *Inside the Atom*. The book – more in the nature of a bound manuscript was of scientific interest intended to educate the uninitiated on the quantum theory. It had not the remotest connection with the defence of India, nor was it a danger to public safety. Prabhakar wanted permission to send the book out for publication but it was refused. He had been detained in accordance with law and the right to move the court under Articles 19 and 21 of the Constitution had been suspended under Articles 358 and 359. This was during the Emergency of 1962 (occasioned on account of the India–China war). On a writ filed on behalf of Prabhakar, the government of Maharashtra justified the order of refusal to permit the book to be published on the ground that when a person is detained he loses his freedom, and can only exercise such privileges as are conferred on him by the order of detention. The Bombay Conditions for Detention Order, 1951, regulated the terms of Prabhakar's detention. It did not confer on him the privilege of writing a book and sending it out for publication. There was legal support for the state government's submission to the court – in the *A. K. Gopalan* case[12] decided way back in 1950. But Justice Subba Rao, speaking for the court, brushed aside this objection. He held that there were different aspects of personal liberty. Having forfeited his right to move about freely by reason of the detention order, the detenu had not forfeited his other freedoms. The liberty to write and publish a book was one such freedom that had not been taken away under the Defence of India Rules, 1962. The Bombay Conditions of Detention Order laid down conditions regulating the restrictions on the liberty of the detenu. This did not mean that he could not exercise his other rights. He turned the argument of the state on its head – revealing its absurdity. 'If the argument (for the state) were to be accepted,' said Subba Rao, 'this would mean that the detenu could be starved to death if there was no condition for providing him with food.' The court held that refusal of the authorities to send the manuscript of the book out of the jail for publication was contrary to law.

It was Prabhakar's case[13] which inspired and showed the way in the spate of later cases on conditions of detention in the 1970s and early 1980s.

Hoskot,[14] the two *Sunil Batra* cases[15] and the decision in *Francis Coralie*[16] were extensions of the principle first enunciated in *Prabhakar*.

The attempt of the Supreme Court (in *ADM Jabalpur*)[17] in the dark days of the Emergency of June 1975 to distinguish Prabhakar's case on the ground that Article 21 was the sole repository of the right of personal liberty and that since the suspension order of the president during that Emergency was unconditional, there was no remedy that the detenu could 'virtually be starved to death' (in Subba Rao's graphic phrase) – was an aberration of Chief Justice Ray. Liberty, Justice Ray had said, was the gift of the law, and could by law be taken away. It was because some of Chief Justice Ray's colleagues concurred in this view that this became the law of the land – though some of them publicly admitted later that they were wrong.

No reference to Subba Rao – or his influence – could be complete without mention of *Golaknath*. *Golaknath* was the culmination of the long battle between Parliament and judiciary. But it all started earlier over differing interpretations of Article 31 of the Constitution (Compulsory Acquisition of Property). Subba Rao single-handedly took on Parliament – backed by judges who shared his views. On 5 October 1964, the court handed down two judgments – both unanimous Constitution Bench judgments – in land acquisition cases from Bombay and Madras. Justice Subba Rao spoke for the court in each of them. Both *Jeejeebhoy vs Asst. Collector of Thane*[18] and *Vajravelu vs Special Dy. Collector, Madras*[19] declared the enactments in question – one a pre-Constitution act and the other a post-Constitution act – void and not saved (though meant to be saved) by Article 31A of the Constitution (saving of laws providing for acquisition of estates, etc.).

It was by an odd quirk of circumstance that Subba Rao came to decide *Jeejeebhoy* (1965) and *Vajravelu* (1965) – and here again C. K. Daphtary was to play a part. Both cases had come up before a bench presided over by Justice P. B. Gajendragadkar who was proceeding to hear them. An objection was raised on behalf of intervenors from Bombay that Chief Justice Gajendragadkar should not hear the matter, he being a member of a cooperative housing society for which the land belonging to the intervenors had been acquired in 1963 under the impugned Bombay Act. No counsel was willing to raise this objection before Chief Justice Gajendragadkar – who could be quite brusque in court. But then there was a 'tiger' at the Bar:

Purushottam Trikamdas! Trikamdas agreed to appear for the intervenors and raise the objection. When the objection was first mentioned by Trikamdas, Chief Justice Gajendragadkar brushed aside the objection. When he forcefully persisted, Gajendragadkar said that he would hear the *Madras* (*Vajravelu)* case, not linking it to the case from Bombay (*Jeejeebhoy*) where he himself had an indirect interest. It was then that Attorney General C. K. Daphtary, appearing for the Union of India, stood up and said to the court that in his opinion the chief justice ought not to hear both the matters. The bench was reconstituted next day with Subba Rao presiding. No one was in doubt at that time (certainly not Daphtary), and no one is in doubt today, that had Chief Justice Gajendragadkar presided, *Jeejeebhoy* and *Vajravelu* would have been differently decided (his pronounced views on the subject were too well known). Daphtary's client, the Government of India, would have won. But it was not to be. Daphtary lost, largely because he supported (in the best traditions of the Bar) the application made by Purushottam Trikamdas!

Meanwhile, Parliament had placed all land-reform laws in the Ninth Schedule[20] protected from all constitutional challenges including violation of Articles 14, 19 and 31. This was done by the Constitution (Seventeenth Amendment) Act, 1964.

With Subba Rao's decision in *Jeejeebhoy* and *Vajravelu*, and with his later decision in the *Metal Corporation* case[21] (in September 1966), the Government of India had failed to convince the court as to its interpretation of Article 31, as amended by the Constitution (Fourth Amendment) Act, and as to the applicability of Article 31A to pre-Constitution laws. The battleground now shifted to the Ninth Schedule – and the scope and ambit of the protection under Article 31B. This necessarily involved the validity of the Constitution (Seventeenth Amendment) Act. It was in *Golaknath* that this question fell to be decided. And it was in *Golaknath* that Chief Justice Subba Rao's qualities of leadership were stretched to the utmost. He was able to persuade a majority of his colleagues (6:5) to place a judicial check on unlimited constitutional power of amendment.

* * *

I remember the late M. K. Nambiar (distinguished father of K. K. Venugopal) telling me that when he first moved the petition in the Supreme Court of India, challenging the Constitution (Seventeenth Amendment) Act – which placed (amongst others) the Mysore Land Reforms Act, 1953, in the Ninth Schedule – he was not at all hopeful, not even of an admission. The law as declared by the Supreme Court was against him. In *Shankari Prasad Singh Deo vs Union of India*,[22] a Constitution Bench of five justices presided over by the first chief justice of India (Sir Harilal Kania) upheld the power of Parliament to amend the Constitution. This constituent power, the court had said, was beyond the scope of judicial review. This was accepted, not unanimously, but by a majority led by Chief Justice Gajendragadkar in the later decision in Sajjan Singh's case.[23] Chief Justice Subba Rao held strong views on the subject. The incorporation device of Article 31B was, in his view, a striking proof of the failure of the Indian Parliament to conform to the Constitution under which it was elected, a view forcefully reiterated in later years by another scholar–judge, Justice P. B. Mukherjee (chief justice of Calcutta) – Nambiar's writ petition was not only admitted but (to Nambiar's surprise) straightaway referred to the full court of permanent judges – then consisting of 11 justices. The arguments were long when compared to the arguments that the court was used to in those days – the case took 22 working days – but much shorter than the arguments in the later larger bench constituted to consider the validity of Article 31C[24] and the correctness of the decision in *Golaknath*.[25] There were many interventions by the individual judges during the argument of counsel except by the two judges sitting at each end of the 11-judge bench: Justice C. A. Vaidialingam and Justice J. K. Mitter. If a judge doesn't speak from the bench during arguments, the Bar is left to wonder which way his mind is moving. Some of us juniors were apprehensive about the two judges sitting at each end and took sporting bets as to which judge would speak first. It turned out to be Justice G. K. Mitter who interjected when he addressed counsel, who was reading from a law report saying, 'Which page?' The judge at the other end (Justice C. A. Vaidialingam) spoke not a word during the entire hearing! He only listened. But Nambiar, the principal counsel who argued for the petitioner, was confident that Justice Vaidialingam was on our side because (as he told us) he was of the same bent of mind as Chief Justice Subba Rao! Besides (he whispered), Vaidialingam was a junior in Subba Rao's chamber when Subba Rao was

practising as an advocate! Chief Justice Subba Rao refused to accept that Parliament, even in its constituent function, could impair or adversely affect the fundamental rights in Part III of the Constitution. But, this would involve invalidating all previous constitutional amendments which had declared valid a series of land reform acts, as also the entire range of anti-zamindari legislation. So he looked around and engrafted an American doctrine (accepted by courts in the United States of America) – the doctrine of 'Prospective Overruling'. In exercise of this doctrine, he validated the Constitution (Seventeenth Amendment) Act, but denied power to Parliament to place any more enactments in the Ninth Schedule! I recall that at the hearing of *Golaknath*, Niren De (then only additional solicitor general of India) was asked by Chief Justice Subba Rao what he had to say about prospective overruling, and Niren De somewhat curtly replied, 'I refuse to argue prospective overruling' – which unsettled the chief justice for a while!

Golaknath had, and still has, many critics. But it was a rare exhibition of cooperative judicial craftsmanship. In *Golaknath*, Subba Rao conceptualized his vision of fundamental rights as 'transcendental'. He always believed – and he said so constantly during the hearing of the case – that the enabling provisions permitting 'reasonable restrictions' to be imposed by law in sub-articles (2) and (6) of Articles 19 conferred sufficient flexibility on courts to pronounce upon and uphold as valid, legislative measures genuinely designed for the greater social good.

* * *

The reasoning in *Golaknath* (bench of 11 judges) was not accepted even by the majority in *Kesavananda Bharati* (bench of 13 judges; a narrow majority of 7:6), which accepted the alternative argument advanced in *Golaknath* and mentioned in the judgment of Chief Justice Subba Rao as having considerable force. It was not found necessary for the decision in *Golaknath*. This alternative argument which was accepted by the majority in *Kesavananda Bharati* (1973) was that the power to amend does not include the power to change the structure – the basic or fundamental structure of the Constitution.

I would say to the critics of *Golaknath* (1967) that if there was no *Golaknath*, there would have been no *Kesavananda Bharati* (1973), and unbridled powers of amendment being conceded, India would have gone the way of some of its neighbours. Since the ruling party always had a massive majority, we would almost definitely have institutionalized a dictatorship through a constitutional amendment, by amending the Constitution to provide for a 'presidential form of government' – a euphemism used in this part of the world for autocratic rule. And with a dictatorship we would have lost the freedom of the press and the independence of the judiciary – two concepts which both Chief Justice Subba Rao and Advocate C. K. Daphtary greatly cherished.

I remember Daphtary saying to me during the June 1975 Emergency after the spate of punitive transfers of high court judges (who had decided cases against the government), 'Fali, what we need now is a Subba Rao.' It was not out of spite or venom but out of despair that he lamented the 1974 'supersession' of judges (J. M. Shelat, K. S. Hegde and A. N. Grover), and bitterly commented on the performance of the man who superseded them viz. Justice A. N. Ray, that lone dissenter, the only judge in an 11-judge bench who had accepted the government's contention in the *Bank Nationalisation* case.[26] As a nominated member of the Rajya Sabha (nominated by the government which declared the Internal Emergency of 1975), Daphtary encapsulated the ignominy of the entire 'supersession' in his speech in the Upper House in just 11 words:

> The boy who wrote the best essay got the first prize.

The 'boy' was obviously Justice A. N. Ray; the 'best essay' was Ray's sole dissent in the *Bank Nationalisation* case (1970); *and* the 'first prize' was when Ray superseded three judges senior to him and became the chief justice of India.

* * *

The other great stellar pointer in the judicial firmament has been Justice Krishna Iyer. He was responsible for – and in turn inspired – a new thrust, a new direction, for the Supreme Court. He helped to humanize the legal system – particularly in the field of criminal jurisprudence and jail reform.

He extended the frontiers of the accountability of the state and its instrumentalities in their ever-expanding operations. He often strayed from the beaten path of the law, spinning his own 'cocoon of jurisprudence', inspired obviously by the fact that in dispensing justice, the answer to the question, 'What result is best for the country?' is not always consistent with the response obtained by asking, 'What is the decision according to law?' He thus treated – and so inspired other judges to treat – binding decisions as no more than decisions applicable to the facts of that particular case. To attempt an assessment of Justice Krishna Iyer through his judgments (as in the case of Subba Rao) would, therefore, not be a correct approach. This judge, more than any other, by his wordy and sometimes seemingly irrelevant judgments, made other judges think. Even when he was writing a majority judgment, he made provision (as in a minority opinion) for the 'brooding spirit of the future'. In a scholarly article which I read sometime ago, the author asked, 'What is the point of a judgment including passages which are on the judge's own admission irrelevant?' And the answer was that there are diverse audiences to whom judicial opinions are addressed. Some judges (in their judgments) are constantly explaining their decisions to litigants and their lawyers, and to succeeding generations of judges. So it is with the judgments of Krishna Iyer. He is also the originator of introducing into judicial pronouncements in India, the 'Purple Patch' (another term for purple passage); the phrase has been explained by Lord Denning.[27]

> When you are covering as with a garment some weighty or important matter you should sew on one or two purple passages so as to attract the attention of those who are unfamiliar with it.

Krishna Iyer's judgments are strewn with 'purple patches'.

He made no secret of the fact that a judge must have a social philosophy and a humane approach to legal problems. Whilst Subba Rao had an obsessive concern with fundamental rights, Krishna Iyer's concern was broader – for the poor and downtrodden. He carved out a special entrance for the destitute in the somewhat formidable portals of the Supreme Court. Along with Justice P. N. Bhagwati, he gave a new dimension to articles in the fundamental rights chapter which had hardly received attention from the

court. The rights against exploitation in Article 23 were, under his stewardship, enforced and given meaning.

Then he had that abiding quality of a great judge – he was fearless. Whilst still a junior puisne judge in the Supreme Court, within two years of his elevation from the Law Commission to the highest court, he sat as a vacation judge during the summer recess of 1975. It was destined to be the most historic summer recess of the court. Indira Gandhi had lost the election petition filed against her by Raj Narain in the High Court of Allahabad. The high court judge ruled that she had forfeited her seat in the Lok Sabha. She sought an absolute stay of the judgment and order. The matter was argued before Justice Krishna Iyer. He could have passed the buck – granting an absolute stay till the reopening of the court when a bench of three or five judges could have finally heard the application. But he did not flinch. Sitting singly and so taking the entire odium on himself, he passed an order granting only a limited stay – consistent with precedent. He said that whilst Indira Gandhi as prime minister could speak in either House of Parliament (so long as she filled that office), she as a member of Parliament could not vote or participate in the proceedings of the Lok Sabha – since she had been unseated by the judgment of a competent court. India's constitutional historian, H. M. Seervai (otherwise critical of Justice Krishna Iyer and many of his judgments), has this to say for the period just before the declaration of Emergency (what he called the first period):

> 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 June 24, 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 six 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'. (*Seervai's Constitution of India*, Vol. I, 3rd Edition, p. 1018)

Great praise indeed. To Krishna Iyer, law was 'value-loaded'. His social philosophy was more than an interpretative tool. It was the mainspring of almost all his judicial dicta. He founded this new 'school of jurisprudence' – which had at one time many adherents; fortunately it still has a few – but now, very few!

A judge carries with him biases and prejudices (his 'can't helps' as Justice Holmes called them). It was the same with Justice Krishna Iyer and the adherents of his school of thought. He always believed that the assertion made in the United States that the Supreme Court is a political institution applied as much to India as to the United States. He once said, 'Law without politics is blind. Politics without law is deaf.' He would rather do justice overriding law than administer what he believed was injustice according to law. After retirement he said, (with considerable exaggeration) 'The myth is that courts of law administer justice, the truth is that they are agents of injustice.' He thus widely influenced some judges to do justice according to their whim, in disregard of law. In this he did a disservice to the adherents of his school of thought. Concepts of justice vary, and some judges sitting in various courts in the country, without Justice Krishna Iyer's legal acumen and not endowed with his extraordinary faculty for distinguishing right from the wrong, have attempted to emulate him. They have failed. Their experiments in imitation have been disastrous, and the blame is laid at the door of Krishna Iyer. Some have attempted to ape his style and use four-syllable words where even one would do. Such persons have failed to realize that Krishna Iyer always regarded language as a vehicle for ideas, and if the manifold ideas in his fertile brain could not be expressed in known language, he (Krishna Iyer) had no hesitation in inventing words, and adapting English words to suit what he believed were Indian conditions. In *Samsher Singh vs State of Punjab*,[28] a bench of seven judges sat to consider whether the Constitution contemplated the president and the governor as real repositories of power or whether they were like the British Crown. Justice Krishna Iyer, in delivering a separate but concurring judgment, posed the question for decision thus:

> Is Rashtrapati Bhawn – or Raj Bhawn – an Indian Buckingham Palace, or [is it] a half-way house between Buckingham Palace and the White House?

Such imagery is inimitable, expected of a Krishna Iyer; intolerable and ludicrous when attempted by someone else.

People who attempt to ape him do not realize that his penchant for long words was not a studied exercise, for he spoke in court in the same vein. I once heard him deliver a judgment in Court Room No. 3 (where he sat) – an oral judgment, a judgment 'off-the-cuff' – where amongst several multi-syllable words he used one with six syllables: 'Ratiocination'. There were many litigants and some lawyers present in court on that day. Half of them, I am sure, could not pronounce the word and most of the others did not know what it meant.

Justice Krishna Iyer loaded into his judgments a rich mixture of law, politics and commonsense – and also compassion. When on the bench, he always reminded me of Lord Denning's picturesque simile of a judge as rider. When counsel urged the master of the rolls (Denning) not to invent a new head of public policy, he retorted, 'I know that public policy in an unruly horse but it is for an able and competent judge to ride that unruly horse and to bring him down on the side of justice.' In the course of his judicial career, Justice Krishna Iyer gladly rode unruly horses – in fact he even looked for them. He showed considerable prowess (and ingenuity) in bringing them down on the side of justice – at times, however, after the ride, the fences of the law needed some mending! The new sights he fixed for the highest court are epochal; the new trends of thought remain long after he has retired – in fact without ever having the authority of a chief justice he left his mark on the decisions of the Supreme Court in the late 1970s. They had a distinctive stamp. They were the judgments of the Krishna Iyer era. But it is well to remember that it is at all times difficult and sometimes dangerous to emulate a person who you cannot hope to be. As Dr Johnson once said, 'Almost all absurdity of conduct arises from the imitation of those we cannot resemble.' So, there are dangers in saying and doing all that Krishna Iyer said and did!

In fact, in the celebrated judgment in *Mohinder Singh Gill vs Election Commission*,[29] Justice Krishna Iyer himself decried the lack of objective standards in judicial determinations. Quoting from a book by Alan Barth (*Prophets with Honour* (1975), Vintage Book, New York), he accepted the standards for judicial decision mentioned there and set out the following passage (with approval):

> A court which yields to the popular will thereby licences itself to practice despotism for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfil their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable.

'The above observation,' said Krishna Iyer, 'would equally apply to the Election Commission.' If so, one may add, it must also apply to the superior courts in the land, including the Supreme Court!

In the court, Krishna Iyer was a prolific writer, an indefatigable worker. His record of judgments, in sheer number, surpasses the statistics of Subba Rao. Subba Rao in his term of little over eight years in the Supreme Court participated in over 560 cases in which judgments were delivered, himself delivering 254. During a shorter period on the bench – a little over seven years (from July 1973 to November 1980) – Justice Krishna Iyer participated in over 700 cases in which decisions were rendered, himself delivering judgments in more than half of them. His preoccupation for quick justice is apparent in his judgments. So is his helplessness at the court not being able to administer it. He starts one judgment with the words:[30]

> Instant or early justice seems impossible without radical reorientation and systematic changes in the judicial process, as these two appeals, which have survived two decades, sadly illustrate.

Chief Justice Latham of the High Court of Australia used to say that when he died they would find engraved on his heart 'Section 92' – the trade and commerce clause of the Australian Constitution which inspired so much litigation at the time, all of which he had to deal with during his tenure as chief justice. Despite the fantastic progress of science in the last decade, there has not yet been invented a cardiac machine which can read what is written on the heart of dear old Justice Krishna Iyer. If there was such an instrument, one would read the words: 'Legal Aid'. In fact, it was he who gave a new meaning to the equality clause in our Constitution. He ruled that if an indigent litigant is not afforded legal aid, he does not receive the equal protection of the law guaranteed by Article 14.

When Justice William Douglas retired from the Supreme Court of the United States after a long tenure spread over three decades, a widely read magazine described him as 'the Court's grandest maverick, a rugged liberal with a shock of white hair, piercing eyes and a luminous regard for the First Amendment'. For 'the First Amendment' substitute 'the Poor' – and the description aptly fits Justice Krishna Iyer.

Even at the age of 90 plus, Krishna Iyer is given to flights of fancy – as when he very recently addressed a tribute to President Barack Obama (*The Hindu*, 15 October 2009) on his being awarded (many felt, prematurely) the Nobel Peace Prize for 2009:

> Mr Obama, as an Indian at the age of 95 who is committed to cosmic peace, I plead with providence to give you the creative verve to be the divine engineer to save our morally declining planet controlled by the whites into a society free from race, colour, caste, communalism and corruption – so that all living creatures may feel a new biosphere where God is no myth but a live force that is materialist at the base and apparelled in a moral structure. You be the prince and make the United States a land where God trod. You are great and often misunderstood, but you are a beam of light and (have) harkened the dawn of an Advaita world. There may be critics, but truth is God and you will win at last.
>
> Emerson wrote: Is it so bad, then, to be misunderstood? Pythagoras was misunderstood, and Socrates, and Jesus, and Luther and Copernicus, and Galileo, and Newton, and every pure and wise spirit that ever took flesh. To be great is to be misunderstood.
>
> Your noble incarnation has a purpose – a passion for execution of the termination of terrorism, not by war or arms but by farewell to blood and iron.

Few retired (or sitting) judges of our higher judiciary could exhibit such intense passion. As a judge, Krishna Iyer has a large reserve of it, and even 30 years after retirement that flame of passion – as to men, matters and events – has not dwindled. This is because of a compensating sense of compassion – passion and compassion have always co-mingled in that restless soul.

It has been said that Subba Rao (and the Subba Rao court) was 'rightist', and Justice Krishna Iyer (and those of his school of thought) were 'leftist'. This is a superficial characterization indulged in by those who are obsessed with 'isms'. Besides, it is not even correct. Each had many similar and abiding major concerns.

The abiding concerns of the Subba Rao court were underlined (coincidentally but characteristically) by the first and the last case in which he presided as chief justice. In the first, he firmly upheld the independence of the judiciary by ensuring that the subordinate judiciary should not be selected except from the judicial service. In *Chandra Mohan vs State of U.P.*,[31] it was contended for the state that it was permissible to the governor (which meant the state government) to frame rules permitting recruitment of judges in the subordinate judiciary not only from advocates and pleaders of requisite standing but also from members of the executive departments discharging revenue or ministerial functions. Chief Justice Subba Rao (in this first case in which he presided as chief justice) rejected the contention saying that it was unreasonable to attribute to the makers of the Constitution who had so completely provided for the independence of the judiciary, an intention to destroy it by an indirect method. 'What can be more deleterious for the good name of the judiciary than to permit at the level of District Judges recruitment from the executive department?' he asked, and then declared the Uttar Pradesh Higher Judicial Service Rules framed by the state government as unconstitutional.

Likewise, Justice Krishna Iyer in the celebrated *Judges Transfer* case,[32] whilst accepting that a judge of the high court may be transferred from one high court to another in the public interest, read into the constitutional provision of prior consultation with the chief justice a virtual mandate – although the opinion of the chief justice of India on the proposal to transfer may not be legally binding, it would have to be accepted (he said), otherwise, without the consent of the head of the judiciary an order of transfer of a high court judge would be per se arbitrary and capricious.

So much for their common concerns – the independence of the judiciary!

In the field of human rights and freedoms too, their views (and, since their influence was considerable, the views of their colleagues and judges who succeeded them) were not dissimilar.

In the last case over which he presided, *Satwant Singh vs Assistant Passport Officer*[33] (known as the *Passport* case), which was successfully

argued for the petitioner by a young promising advocate of the time (Soli Sorabji), Chief Justice Subba Rao speaking for a majority in a bench of five judges held that the expression, 'personal liberty' in Article 21 encompassed a right of locomotion, of the right to travel abroad. Every person living in India has a fundamental right to travel, even outside India, and the refusal of the government to give him a passport without valid law-prescribing reasonable restrictions was held to be an arbitrary exercise of executive power, infringing the equality clause of the Constitution. In this last case, Subba Rao had, in fact (with the help of Justices J. M. Shelat and C. A. Vaidialingam who concurred with him), converted his minority opinion in *Kharak Singh*[34] as the declared law of the land. There is a sequel to this decision which concerns Justice Krishna Iyer.

Soon after the decision in *Satwant Singh*[35] in 1966, Parliament passed the Passports Act, 1967, regulating conditions for the grant and refusal of a passport, and also providing for conditions on which a passport once granted could be impounded. Ten years later (in 1977) when the Janata Government was in power and the Congress (I) in opposition, Maneka Gandhi (daughter-in-law of Indira Gandhi) received a peremptory letter from the Regional Passport Officer of Delhi informing her that it had been decided by the Government of India to impound her passport, under the provision of the Passports Act – and in the public interest called upon her to surrender it. She asked for the reasons why this decision was taken. The reply was that the government had decided in the interest of the general public not to furnish her a copy of the statement of reasons for making of the order. Maneka Gandhi moved a petition in the Supreme Court, and pending hearing of the petition she was required to deposit her passport with the registrar of the court. Justice Krishna Iyer was on the bench of seven judges which heard the petition. Concurring with Justice P. N. Bhagwati who wrote the judgment in what is regarded by many as a landmark case, Justice Krishna Iyer in a separate opinion endorsed the majority judgment of Subba Rao in *Satwant Singh* case, decided way back in 1966. He showed his abiding concern for human freedoms and human rights. He held, along with the court, that the right to travel abroad was not only encompassed in the right to liberty under Article 21, but that right could only be denied if the procedural law which governed its exercise was fair. The words 'procedure according to law' in Article 21, he said, means fair, not formal, procedure. In characteristic Krishna Iyer prose he said, 'No

Passport Officer shall be a mini Caesar nor a minister an incarnate Caesar where the Rule of Law reigns supreme … Under our constitutional order, the price of daring dissent should not be "passport forfeit".' The laconic order of the passport officer and his refusal to give reasons were characterized as unfair and violative of natural justice by all judges including Krishna Iyer. In what he described as his 'concluding caveat', he said that we should never forget the watershed between a 'police State' and 'people's *raj*'. The policing of a people's right on exit or entry, he said, was fraught with grave peril to liberty. So, you see, this abiding concern for human freedom too was no different than Subba Rao's.

My regret, however, is that after all this, Krishna Iyer agreed with the majority in virtually denying relief to Maneka Gandhi. Only one judge (Chief Justice M. H. Beg) in this bench of seven said that the order of the government had to be quashed as this was the only logical conclusion to the unanimous finding of the court that the order was contrary to natural justice and violative of Article 21. But the other judges, including Justice Krishna Iyer (as also two future chief justices of India – Justice Yeshwant V. Chandrachud and Justice P. N. Bhagwati), after holding that the government order was illegal and void, inconsistently and illogically maintained the order, impounding the passport on the basis of a statement made on behalf of the government by the then attorney general that the government would give a hearing (a post-event or a post-decisional hearing) to Maneka Gandhi, and if the decision to impound her passport was maintained, its operation would be limited to six months from the date of the government decision. Till then the passport was to remain with the registrar of the court. Virtually an indefinite impounding of the passport was not only tolerated but affirmed by the final order of the court.

Contrast *Satwant Singh* and *Maneka Gandhi*. In 1967, Satwant Singh (as a result of Subba Rao's judgment) got back his passport on the ground that the refusal to permit him to go abroad was violative of his fundamental right and there was no law which prevented him from obtaining it. In 1977, Maneka Gandhi (as a result of Justice Krishna Iyer's judgment and the judgment of six of his other colleagues, all of whom held that the order impounding her passport was illegal and void) did not get back her passport to enable her to exercise her fundamental right to go abroad, which the court had upheld. She won the case but was denied ultimate relief. The underlying message of all this was not lost on discriminating members of

the Bar and the public – the wave of popularity of the Janata Government (the case was heard in the second half of 1977 and the judgment was delivered in January 1978) and the then public unpopularity of the Indira Gandhi family did not fail to have their impact on the court. There was, after all, much truth in Justice Cardozo's confession made in a different country, and in a different century, that the hydraulic pressures of great events also influence judges – 'they do not idly pass them by'. If this is seen as a criticism of Justice Krishna Iyer, so be it.

Subba Rao too had his 'Achilles heel'. The man who had spoken a great deal about the dangers of politicians influencing judges and insulating the judiciary from them was himself seen to be hobnobbing with them whilst still chief justice of India. The day after he retired, he was nominated by the leader of the opposition in Parliament (Minoo Masani) as the opposition party's nominee for the office of president. It was obvious then that he had been meeting with leaders and member of political parties whilst still head of the judiciary and whilst still sitting in court deciding cases of citizen against the state. The manner of his going did little credit to his outstanding career as a great judge.

All of this in the end goes to show that judges are human beings, and that human beings, like stars in the firmament, have blemishes. Despite such blemishes they shine. It is to the credit of these two great men, that after taking into account their frailties, they shine, and shine brightly – like the two pointers in the northern sky.

* * *

The other judge of the pre-supersession era, Justice S. M. Sikri, was the chief justice when I moved to Delhi in May 1972 as additional solicitor general of India. He is now almost forgotten but it is necessary in these times to recall the travails of the distant past. It helps to fix our sights and to forge pathways for the future. And what follows is the story of the two notorious 'supersessions', when contrary to settled practice the next seniormost judge of the Supreme Court was *not* appointed chief justice of India on the retirement of the incumbent chief justice of India.

Prior to his retirement (on 25 April 1973), Chief Justice Sikri had recommended to government (as was customary) the name of the next

senior judge on the court as his successor, Justice J. M. Shelat. This was at a time when Sikri was presiding over the largest bench of justices that ever sat to determine a case – *Kesavananda Bharati*. This bench of 13 justices was specially constituted to hear and decide the fiercely controversial question as to whether Parliament, in the exercise of its constituent power, and with the requisite two-thirds majority, was competent to amend any and every provision of the Constitution of India. It was only a day before Chief Justice Sikri retired that the entire court assembled to announce its decision. It was a discordant one. As many as 11 judgments were handed down by 13 justices. They fill over 600 pages of the law reports. They are long on learning, but short on clarity. The government had argued before the bench for unbridled power of amendment. It lost (but only narrowly, 6:7).

But who lost or won became secondary to the ill feeling engendered amongst the justices. They could not even agree on what the majority of the court had decided – some of them petulantly refused to sign the summary of the final order (reported only in 1973 Supp. SCR 1). Only 9 out of the 13 judges on the bench signed this final order reproduced below:

The view by the majority in these writ petitions is as follows:

(1) Golak Nath's case is over-ruled;
(2) Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution;
(3) The Constitution (Twenty-fourth Amendment) Act, 1971, is valid;
(4) Section 2(a) and (b) of the Constitution (Twenty-fifth Amendment) Act, 1971, is valid;
(5) The first part of section 3 of the Constitution (Twenty-fifth Amendment) Act, 1971, is valid. The second part, namely 'and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy,' is invalid;
(6) The Constitution (Twenty-ninth Amendment) Act, 1971, is valid.

The Constitution Bench will determine the validity of the Constitution (Twenty-sixth Amendment) Act, 1971, in accordance with law.

The cases are remitted to the Constitution Bench for disposal in accordance with law. There will be no order as to costs incurred up to

this stage.

S. M. Sikri C. J.
J. M. Shelat J.
K. S. Hegde J.
A. N. Grover J.
P. Jaganmohan Reddy J.
D. G. Palekar J.
H. R. Khanna J.
A. K. Mukherjea J.
Y. V. Chandrachud J.

Dated April 24, 1973

What followed was even worse. The government of the day, encouraged by the division (and rancour) amongst the court's members was emboldened to spurn Chief Justice Sikri's recommendation of Justice Shelat as his successor – a timely reminder of how quickly governments cash-in when judges are split into different camps! Bypassing the next three senior judges (Justice J. M. Shelat, Justice K. S. Hegde and Justice A. N. Grover) who had pronounced against the government in *Kesavananda*, the successor chief justice was hand-picked from amongst the judges who supported government's stand (in that case). Justice A. N. Ray was appointed chief justice of India. Decision making in the *Great Constitution* case, followed closely by the 'super session', had a seismic effect on the entire edifice of the court. It was badly shaken and weakened. It has never been the same since. After the supersession of April 1973, it was feared that it might happen again. And it did. In January 1977 when Justice M. H. Beg (then No. 3) was appointed chief justice of India on the retirement of Chief Justice Ray, ignoring the seniormost puisne judge on the court, Justice H. R. Khanna (No. 2). And his sin? – It was Khanna's judgment that had tilted the balance in *Kesavananda* against the government. He held that the power to amend, though plenary, could not be so exercised as to destroy the basic structure of the Constitution. That was not all. Khanna had the temerity (or courage – depending one one's point of view) to dissent (the lone dissenter) in the Emergency case (*ADM Jabalpur*).[36]

Khanna was, therefore, superseded. But this time the government had an alibi. Chief Justice Ray had himself recommended Justice M. H. Beg (No. 3) as his successor in preference to Justice Khanna (No. 2)!

It was these two supersessions that cemented the general impression amongst members of the thinking public that the government did not want independent judges. The lasting effect of this impression has neither been removed, nor mitigated by the fact that there have been no supersessions since then. We have always had – and are still proud to have – brave and independent judges. But the trouble with administering shocks to the judicial system is the lurking fear that it might be administered again. It is not enough that the government of the day appoints judges who are not afraid of the government or of anyone else. People – reasonable people – must also believe they are not. Chief Justice Sikri presided, strong and imperturbable, over a court which inspired the confidence of all sections of public opinion. This confidence was rudely shattered with the supersession that followed his retirement. His successor did little to restore people's faith in the integrity of the court over which he presided.

As to how such integrity could be regained, former Chief Justice P. B. Gajendragadkar had a theory about which he expounded at a dinner hosted by Justice J. L. Nain (then chairman of the Monopolies and Restrictive Trade Practices Commission) in the latter half of 1975. Gajendragadkar had retired as CJI in March 1966, and was later appointed chairman of the Law Commission of India. Gajendragadkar said to me:

> Do you know Fali what I would have done, if I had been appointed Chief Justice superseding three senior judges, who were then compelled to resign?
>
> 'Tell me,' I said. And the old sage gave his sagacious prescription:
>
> I would have waited for the first important case after this in which the Union of India was an active contestant, and then decided against the government!

But it was not to be. In the eyes of the incumbent, Chief Justice Ray, the government of the day could do no wrong – a regrettable attitude which

hardened after the Emergency of June 1975.

* * *

Now, about a few other judges whom I remember – some influenced my thinking; others are worthy of being remembered: Justice M. Hidayatullah, Justice J. C. Shah, Justice A. P. Sen (AP) and Justice D. A. Desai. Yes, quite a mixed bunch but that is how individual preferences are.

I was privileged to appear before Justice M. Hidayatullah when he presided on the bench of the Supreme Court as chief justice of India from February 1968 to December 1970. He was erudite, but carried his learning lightly. Always charming and courteous to the Bar, he had a flair for the appropriate turn of phrase (the French call it, *le mot juste*). But it was not only in his judgments that he was eloquent. His brief but precise introduction to the sixteenth edition of Mulla's classic work on Mohammedan Law is a piece of writing unmatched in India's legal annals.

Fali Nariman and Justice M. Hidayatullah with members of a foreign delegation

His extrajudicial utterances were not without humour. His description of the three great organs of state: the executive, the legislative and the judiciary – will be long remembered for the barbed innuendos. About the proliferation of bureaucrats in the government, he adapted an old nursery rhyme ('Ten Little Niggers') to produce what he described as 'a poem of truth':

One civil servant with nothing much to do
Wrote a Memorandum and there were two, Two
civil servants over cups of tea
Formed a working party, and there were three
Three civil servants drafting forms galore,
One whispered 'Planning' and then there were four
Four civil servants found they could not thrive
Without coordination, and then there were five.

And so it went on to the last lines which were:

Nine civil servants very busy men,
Just ask them what they find to do.
You'll find they have grown to ten.

About Parliament, his observation was that only a handful of people really took seriously to the task of law making. Others were silent spectators, which (he said) was not a bad thing, because a legislature which said nothing and did much was to be preferred to one where members talked too much and did nothing! And as for the judiciary he believed that in writing judgments, judges should not pontificate or indulge in grandiloquence. Quoting Dr Johnson he pointedly compared 'certain writings' to a meal which is 'ill-killed, ill-dressed, ill-cooked and ill-served', an apt description of judicial opinions that are badly written! Haddi, as he was popularly known, loved quoting Samuel Johnson. Even his scintillating autobiography is titled *My Own Boswell* (Arnold – Heinemann Publishers (India) Ltd., New Delhi, 1980). It does one good to remember a judge as eloquent and as distinguished as Hidayatullah. His lasting memorial for posterity is the judgments he has left behind. After 59 years at the Bar, I am convinced that the finest epitaph for a judge is, 'He never wrote bad judgments – only elegant ones, eminently readable by one and all.' A fitting epitaph for dear Haddi.

* * *

The first thing that struck anyone who saw Justice J. C. Shah on the bench was that with his rich mop of silvery white hair, he looked every bit a judge.

He had the natural air of being someone in particular! So much so that when he sat in a Supreme Court bench of 11 judges in the celebrated *Golaknath* case, his deportment prompted an American visitor sitting at the far end of the court to enquire as to 'why when such a nice looking judge is speaking, the man standing in front keeps rudely interrupting him'? She was referring to the arguing counsel, Nani Palkhivala! This (probably apocryphal) story was repeated years later by C. K. Daphtary to Chief Justice Sikri, when the latter presided over a bench (this time of 13 justices) in the even more celebrated case of *Kesavananda* (1973), when the main argument was (again) by Palkhivala, and the interruptions from the bench were more frequent. When Daphtary told the chief justice this story, Sikri responded with a smile, 'Yes, yes, I see your point.' The point was – and is – that in important cases judges do tend to talk too much. Of course, J. C. Shah spoke the least, but he too was not a silent spectator when sitting on the Supreme Court bench in *Golaknath*.

I first saw him in my early years at the Bar, as a presiding judge trying suits on the original side. He was already a judge when I joined the Bombay Bar in November 1950. In Bombay, J. C. Shah was solemn – serious and imperturbable – hardly a smile escaped his lips. Except on one occasion when I was sitting in his court during the hearing of a long cause (so described since it was the final hearing of a suit where witnesses were examined). An expert witness, Dr Vajifdar, was being cross-examined in a testamentary suit, as to whether a will was properly understood by the deceased and whether the deceased was of sound and disposing mind. The cross-examiner was the well-known criminal lawyer, K. A. Somji – who looked every bit as leonine as the presiding judge. (Somji had a mop of hair on his head as white and silvery as Shah's!) After a couple of days of intense cross-examination, the expert witness wavered a bit and did not answer a question though it was repeated to him twice. Somji (quite exasperated) then asked him, 'What is it doctor? What are thinking of?' And the answer was as truthful as it was blunt. '*Arré*, I was thinking of the nice game of bridge that I would have been playing if you had not detained me here,' at which even Justice Shah burst out laughing. Counsel Somji was not amused.

J. C. Shah, whether he sat on the original side in Bombay or on the appellate side (more often on the appellate side since he was, before being elevated, the leading counsel there), was terse and effective, and would not

change his mind. I once heard senior counsel, after arguing before him, come into the corridor and say, 'Nothing will move him – the shutter is down.' In Bombay he was by temperament pro-establishment. He then genuinely (and rather facilely) believed in the presumption enacted by the Indian Evidence Act of 1872, that 'official acts are regularly performed'. Long experience on the bench made him change his opinion but only after he was appointed a judge of the Supreme Court in October 1959.

He was one of the most effective judges who sat on the Supreme Court Bench in the early 1970s when I moved to Delhi and started practice there. And, his disposal rate was truly phenomenal. He was also a very intense listener, so intense and so keenly perceptive that counsel, after exhausting themselves in argument, would feel chastened, and could not go on longer than was strictly necessary! I recall a case where I had made intense preparations and assimilated a long line of cases on when a leave-and-licence document was not a lease, and was ready to expound on them when my appeal in the Supreme Court reached hearing. The bench was about the strongest one could get – J. C. Shah and K. S. Hegde – both judges with razor-sharp minds (it was always an exciting experience to appear before this bench). They listened; they heard my pleas and the summary of the case law that I proposed to cite. Then J. C. Shah brushing aside the case-law summed it all up by saying, 'If the document looks to us like a lease, then it is a lease and not a license!' That was that. We were bowled out in one hour flat. All my preparations went for a six!

Sometimes Shah's pronouncements from the bench would irritate his old friend and erstwhile colleague of Bombay days – C. K. Daphtary. Chandubhai was once leading me in an appeal from Bombay – *Dhanrajamal Gobindram vs M/s Shamji Kalidas & Co* – AIR 1961 SC 1285. It was a case under the old Arbitration Act of 1940, and it was one of my infrequent appearances in the Supreme Court, at a time when I was still regularly practising in Bombay. The case was before a three-judge bench – Justices J. L. Kapoor, Hidayatullah and Shah. Our clients had lost in the high court and when Daphtary opened the appeal, Shah was not very receptive. And when Daphtary persisted, Shah on one or two occasions cut him short. Shah then made a peremptory statement about the law – as to whether the question relating to the validity of an arbitration agreement was arbitrable – and what he said from the bench (that it was) was contrary to a case that he had himself decided when sitting (singly) in Bombay. As I still

recall, it was Soonavala's case (*Soonavala vs Natvarlal*) reported in AIR 1952 Bombay 349.[37] I jumped up and whispered to Daphtary and told him this, and attempted to hand over the judgment. But old CK, consummate advocate that he was, signalled me to sit down. He would not take the book from me. He went on, and then after a few sentences casually spoke about a judgment of the Bombay High Court in Soonavala's case. Shah, who had a mind like a bell, immediately responded, 'Yes, yes that's my judgment!' And seeing me jump up again with the book, Shah put out his hand to receive it. But Daphtary again sat me down; he would not take the case and would not let me hand over the decision to the Bench! He just would not give Shah his own judgment! And then old CK, in one of those memorable remarks of his for which he was so famous, said, 'No, no, My Lord,' (on Shah's insistence at the judgment being handed up to him) 'it is only a judgment of yours in the Bombay High Court. Sitting here in this court it is open to Your Lordship to repent!' To which, of course, Justice Kapoor (the presiding judge) and Justice Hidayatullah – each of whom always liked a laugh – prodded each other in the ribs and had a long snigger, and this time Justice Shah was not amused!

* * *

Justice K. S. Hegde (after his retirement) was very kind to me on my infrequent visits to Bangalore. He would often entertain my wife and me to dinner at which would flow stories of old. I recall K. S. Hegde telling me as to how when he sat with J. C. Shah (they would hear about five to six heavy appeals in a day – all final hearings), Shah would have dictated the judgment by the very next evening, and Hegde would find it on his table for scrutiny the next morning! I also remember that many years after his retirement, Justice Hidayatullah visited our home in New Delhi (old 'Haddi' was a great raconteur and a lovable one at that). He told us about the privy purse case (*Madhav Rao Scindia vs Union of India*, 1971 AIR 1971 S.C. 530) where he (Hidayatullah) presided as chief justice over a large bench of 11 judges. In Madhav Rao Scindia's case, the presidential order – under Article 366(22) of the Constitution derecognizing Maharaja Scindia of Gwalior, and other rulers of Indian States that had acceded to the Union – was struck down as illegal and inoperative by the Supreme Court

and the rulers were held to be entitled to all the pre-existing rights and privileges including the right to their privy purse as if the presidential order had not been made. Within a few days of the arguments concluding, in that landmark case, Shah wrote out his own judgment and circulated it to the chief justice and his other colleagues. On seeing Shah's judgment on his table (which he did not expect that soon), Hidayatullah told us how he had sat up two nights in succession to complete his own judgment as chief justice of India. He too then circulated the same, but it was too late. To his regret, his colleagues on the bench (viz. Sikri, J. M. Shelat, Vashisht Bhargava, C. A. Vaidialingam, A. N. Grover and I. D. Dua) had already read and assented to Shah's judgment – not his! (Justices Mitter and K. S. Hegde wrote their separate judgments.) Haddi told us all this with a tinge of complaint in his voice because he believed that as chief justice of India, his judgment should have been the first in the field, and the main judgment in the case. But it was not – his story about the judgment in the *Madhav Rao Scindia* case is an instance of Shah's tremendous pace of work. When you read them, you will find that Shah's judgments are always well expressed, to the point, never overstating anything, and easy to understand.

Bapsi and Fali Nariman with Justice M. Hidayatullah

During the recent confirmation hearings of Chief Justice John Roberts of the US Supreme Court, Roberts had mentioned before the US Senate that 'clarity in legal expression encourages citizen participation'. Roberts cited his favourite judge, Justice Jackson, 'You shouldn't have to be a lawyer to

understand what Supreme Court opinions mean. One of the reasons I have given previously for admiring Justice Jackson is, he was one of the best writers the Court has ever had; his opinions were not written in jargon or in legalese.' The opinions of Justice J. C. Shah were neither written in jargon, nor did they smack of 'legalese' – an example for all who have the task of writing judgments in this country.

J. C. Shah was about the 'quickest-on-the-draw' (as they used to say of the sharp shooters in the Wild West). As a judge in the Supreme Court, he still holds the record for delivering reserved judgments the earliest after conclusion of arguments. He never delayed them – as he once told me a couple of years after he retired (at a tea party in Delhi) – it was very difficult to recall everything that happened if a judge delayed delivering judgment in a case where arguments had been heard. In those days there were no written arguments to assist the judge's memory – only an elaborate statement of the case prepared before oral arguments.

Incidentally, the written arguments era first started with the *Golaknath* case, where a bench of 11 judges (Shah included) was constituted by Chief Justice Subba Rao to consider whether fundamental rights could be amended by a constitutional amendment. In that case, the lead counsel was M. K. Nambiar, and all of us juniors were keen that he should be the first to argue the matter. But there was an earlier petition filed on the same point by R. V. S. Mani, a loquacious advocate from Nagpur who refused to yield, and insisted that he argue first. He did so, and when he started he said, 'My first proposition, My Lords, is …' and all the judges wrote down the first proposition. He then went on and said, 'My second proposition My Lords is …' and the judges wrote that down. And this went on till the eighth and ninth proposition, and when Mani came to, 'My tenth proposition My Lords is …', Justice J. C. Shah lost his cool. He threw down his pencil from the bench and said, 'No more – you give it to us all in writing.' And this was the beginning of the era of written arguments in the Supreme Court!

If there was one person who visibly changed his outlook on things, especially on fundamental rights, it was Justice J. C. Shah. Transformed since his pro-establishment days in Bombay, he was pro-citizen in the Supreme Court. This was entirely due to the influence of Subba Rao.

Justice Shah had a long tenure in the Supreme Court, from October 1959 to January 1971, but only one month as chief justice. He delivered the largest number of judgments since the Supreme Court was established.[38]

Shah succeeded Hidayatullah as chief justice of India (in December 1970) and Sikri succeeded Shah in January 1971. Sikri was the first direct appointee from the Bar. He retired at age 65, on 25 April 1973 – two days after the momentous judgment in *Kesavananda Bharati* (7:6) was handed down (a decision which was like an earthquake; it nearly shattered the court!). As was said then, 'The largest bench (of thirteen judges) sat for the longest time' (nearly four months), holding that there were inherent limitations in the amending power. The judges who so held included Justices Shelat, Hegde and Grover. Shelat was next in line for chief justiceship but all three were 'superseded' and the chief justiceship (after Sikri) was offered to and accepted by Justice A. N. Ray – who then became chief justice of India. Shelat and Hegde promptly resigned, and so did Grover (though a little reluctantly). Those were tumultuous days. Shah, who had been on the court till only a couple of months before, closely followed this entire episode, and was greatly embittered by it. He never forgave Indira Gandhi for this – as was evident in his handling of the Shah Commission of Inquiry, where somehow he was not his old dispassionate self, but very much a person concerned with what had happened and with the outcome. The Shah Commission, as everyone knows, was appointed after Indira Gandhi lost the general elections in March 1977.

Shah was a fine, independent judge. Justice Patrick Devlin writes in his book, *The Judges* (Oxford University Press, 1979, p. 9), 'The reputation for independence and impartiality is a national asset of such richness that one Government after another tries to plunder it.' I once knew a fine, independent judge in South Africa during the days of apartheid – Judge–President John Milne of the Natal Supreme Court. We used to correspond, and Milne said something similar. Milne wrote to me on one occasion (in despair):

> It seems that however much they may pay lip service to the idea that the Judiciary is totally independent of the Executive, politicians throughout the ages and throughout the world would actually much prefer to have executive minded lackeys and are considerably irritated by independent Judges functioning in an independent manner.

Shah shared this view. He believed that the object of all governments was to harass independent judges. Amongst the great independent judges of the

past he must be revered and honoured, after all, he was one of the most distinguished of that tribe.

* * *

When speaking of judges of yesteryear, I cannot help but recall Justice A. P. Sen. He served as advocate general of the state of Madhya Pradesh in 1967–1968, and was then elevated to judge of the state high court (1968 to 1976). He was hailed for his now-celebrated judgment of 1 September 1975 (delivered when he was in the High Court of Madhya Pradesh) in *Shivkant Shukla vs ADM Jabalpur*. The great advocate of Jabalpur, Rajinder Singh ('Sardar Sahib', as he was affectionately known), appeared in this case as amicus to help the court. All credit goes to this great High Court of Madhya Pradesh which overruled the preliminary objection of the government that a writ petition did not lie after a Proclamation of Emergency was issued and after the Internal Security Act was drastically amended. Justices A. P. Sen and R. K. Tankha, in their celebrated judgment, rejected the plea that constitutional remedies under Articles 32 and 226 were barred or could ever be barred by ordinary legislation – short of amendments to the Constitution.

The lamps of liberty, briefly lit in the high court judgment in *Shivkant Shukla vs ADM Jabalpur* (and reiterated in nine other high court judgments in the country), were swiftly put out by the notorious judgment of our Supreme Court in April 1976. The opinion of the House of Lords, *Liversidge vs Anderson* – 1942 Appeal Cases 206 – which had put out the lamps of liberty in England during years of the Great War (1914–1918) has been characterized in Wade's *Constitutional and Administrative Law*[39] as 'an instance of judicial unwillingness to review executive discretion best explained by war-time circumstances'. The same cannot be said of *ADM Jabalpur* which was in peace-time. There were no 'war-time circumstances'. *ADM Jabalpur* is a blot on the judicial annals of a free country. Old A. P. Sen was 'punished' for his judgment (delivered in the high court and reversed by the Supreme Court) and was transferred to Rajasthan in June 1976 from where he returned after the end of the Internal Emergency as chief justice of Madhya Pradesh in February 1978.

A. P. Sen was then elevated to the Supreme Court. Humble as he was, he always said that not he but G. P. Singh, his professor,[40] (who was judge in

the High Court of Madhya Pradesh from 1978 to 1984) should have been appointed. My wife and I were very close to AP. He was the only judge whom we would occasionally visit once in a couple of months in Delhi. When he retired, I wrote to him and I said that, 'When appearing in your court you summarily dismissed almost all the SLPs, in which I appeared, but I still will sincerely miss you.' Once, when I appeared in a SLP before him, I could hardly utter a word when he told me, 'Mr Nariman, the only important thing in this Special Leave Petition is that you are appearing in it. DISMISSED'; after which both of us burst out laughing! But A. P. Sen was as solid as they get. On freedom of the press and on personal liberties he was a real tiger and one could always rely upon him, as we did in the famous *Indian Express* case,[41] a case about which I am truly proud. But one cannot describe the case without some reference to the man who inspired it.

Ramnath Goenka was founder and managing editor of *The Indian Express*, and he had, what Napoleon called, courage of 'the-two o'clock-in-the-morning-kind' – unprepared courage that is necessary to meet an unexpected occasion! Goenka faced the Emergency of June 1975 with grit and determination. For the entire period that it lasted (upto March 1977), he stood erect and defiant, a towering figure – the symbol of the free press in India. During the Internal Emergency, The Indian Express Group of Newspapers faced criminal prosecutions all around the country – prosecutions under the Companies Act, 1956, for not filing certain documents with the registrar and/or filing them beyond the stipulated time. Invariably, the magistrates (who looked upwards for guidance) would not dispense with the personal appearance of the managing director, and Ramnathji spent most of his waking hours shuttling from one place in India to another, dutifully putting in his personal appearance before the courts across the country. But he was not deterred. He was the embodiment of the spirit of man so eloquently described in William Henley's great poem ('In Invictus'):

In the fell clutch of circumstance,
I have not winced nor cried aloud:
Under the bludgeonings of chance
My head is bloody, but unbowed.
It matters not how strait the gate,
How charged with punishments the scroll,

I am the master of my fate:
I am the captain of my soul.

Ultimately, when the national nerve centre of the *Express* – the entire Head Office Building at Bahadurshah Zafar Marg – was threatened to be taken over by a seemingly vengeful government for breach of some municipal bye-laws, Goenka reacted by moving the Supreme Court of India under Article 32 of the Constitution. In so doing, he took on the entire might of the Government of India. He had stalwarts to help him: Editor Arun Shourie, Chartered Accountant S. Gurumurthy and Advocate Arun Jaitley. I led the team in court. Happily for us, the case came up for hearing before a bench presided over by Justice A. P. Sen; AP was an otherwise negative judge in granting relief, but liberal to a fault when free speech and personal liberty were involved. He was not a much-speaking judge but he was a good listener. He rarely barked; but his bite was that of the proverbial bulldog. Once he made up his mind about the unfairness of the stand of the government in our case he just would not let go. He was unrelenting. The *Indian Express* case dragged on – being heard at intervals for more than a year, but eventually it did reach a successful conclusion. In the main judgment of the court (delivered by Justice A. P. Sen) it was held that the notices of re-entry upon forfeiture of the lease of the land on which the Express Building and the press stood, and the threatened demolition of the Express Building were intended and meant only to silence the voice of the *Indian Express*. They, thus, constituted a direct and immediate threat to the freedom of the press and were violative of Article 19(1)(a) read with Article 14 of the Constitution. Hence, the writ petitions under Article 32 before the Supreme Court were maintainable and the notices were quashed. The insolent might of the government of the day had been thwarted. I still recall that at times – during the prolonged hearings – when my own courage as counsel would give way, I would ask Ramnathji why he did not approach the authorities for a settlement, and the old war-horse would stand up, raise his head in defiance, clench his fists, and say, ‘No – Nariman – No – We will fight!’

Fali and Bapsi with Nina and Khursheed at the Delhi Parsi Anjuman

A more personal reason for mentioning A. P. Sen was that he reintroduced me to our physician, Dr R. K. Caroli. When I first came to Delhi to take up office in May 1972, we were accommodated in a government bungalow at 7, Safdarjung Lane, behind Prime Minister Indira Gandhi's residence – which meant that for us there was no shortage of electricity or water! Safdarjung Lane is one of the most liveable places in Delhi. The variety of the birds of Asia that would visit us in the garden in the evenings was simply staggering. At Safdarjung Lane we came to know Dr Caroli, who visited us as a physician. He was also special physician to the president of India. After I resigned in June 1975 we lost touch, and then many, many years later, after A. P. Sen had retired (he had settled in Nagpur), he came to our home at Hauz Khas Enclave for a meal. He mentioned Dr Caroli, and said that I must keep consulting him. This was a golden piece of advice which I remember, and greatly cherish. Dr Caroli, very graciously, not only agreed to be my physician once again, but my wife and I have continuously harassed him over the years, not only from Delhi but from odd places around the world (during our travels) – as to what to take and what not to take in given situations. He is truly a genius of a physician, conversant not only with problems of the heart, in which he is

an expert, but on ailments in almost every part of the human anatomy. He has now become an essential part of the Nariman household.

Every individual who crosses 70, and then ventures into the (forbidding) 80s, has to be wired to a life-support group. Mine has been my wife, Bapsi, and our grandchildren, Nina and Khursheed, whom it is our delight to see, meet and talk with almost every single day. However, my life-support group extends to Bombay as well, where some of my dearest friends live; three, out of many, deserve special mention: Limji C. Mistry, Bomi M. Mistry and Russi Lala. I remain in touch with each of them by telephone and make it a point to meet them whenever I am in Bombay. In myriad ways, they have been a great help to me and I am much beholden to them. But no man can live on love and affection alone. As one gets on in age, medical attention is an essential part of one's life-support system, and that is how Dr Caroli has been very much a part of our daily lives (especially in trying and emergent times). And he does all of this for us, for nothing! Just for old time's sake, and for AP's sake! Whenever I consult my family doctor, Caroli, I invariably think of AP, and say to myself, 'God bless old AP,' and I then mumble to myself, 'God protect our dear Dr Caroli.'

Fali Nariman with close friend, Bomi Mistry

* * *

It has been said that judges without a social agenda are not crusaders but only problem solvers, but they too have their uses. I believe that the ideal mix for a progressive higher judiciary – which includes the high courts as well as the Supreme Court – is three-quarters problem-solvers and one-quarter crusaders!

Dhirubhai A. Desai, like his judicial mentor, Krishna Iyer, was in the crusader class. It has been said (somewhat irreverently) of the judges of US Supreme Court that 'once they are in place they can do what they damn well please'! To those who wonder (some with alarm) at what some present justices of our Supreme Court are in fact doing, I would answer, 'Do not be alarmed or surprised. Judicial review and judicial interference at all manner of injustices is not an innovation. It has been the watchword of judges of the likes of Dhirubhai for many, many years.' He was our maverick judge and I liked him.

I remember how sitting singly (in the Gujarat High Court) he electrified the entire corporate sector in Ahmedabad and Bombay with his judgment in the *Woodpolymer* case (*Wood Polymer Limited vs Bengal Hotels Pvt. Ltd.*, 109 ITR 177 (1977)). It was a judgment under the Companies Act, 1956. Justice Desai refused court-sanction to a scheme of amalgamation between two companies (even when the scheme had been previously approved by the necessary statutory majority of the body of shareholders of each company) because – and only because – it was motivated by tax avoidance. In *Wood Polymer*, the transferor company appeared to have been created solely to facilitate the transfer of a building to the transferee company without attracting the liability to pay capital gains tax, and in the scheme of amalgamation, dissolution of the transferor company without winding up had been sought so as to not pay capital gains tax! Justice Desai did what he thought was right and just. In this judgment of his, we first saw the workings of a mind with a clear social agenda.

Even before this, in early 1971, when I was still practising in Bombay, I remember the consternation expressed by some of the leading advocates of the time who were engaged on behalf of prominent directors of a Gujarat company (in liquidation)! They had just returned to Bombay after a confrontation with the company judge in Ahmedabad. They had endured a nerve-racking session with one who was then described to me (rather irreverently) by a well-known advocate of the time as 'that mad judge – a fellow called Desai'!

And the sin of this judge with an epithet was that he had required at the next hearing of the case of the company (the company in liquidation), the personal presence of each and every one of its former directors, threatening to march off the whole lot of them to prison (on the next occasion) for not ensuring payment of the company's contribution to the employees' provident fund whilst the company was a going concern. There was a method in Dhirubhai's so called 'madness'. I was later informed that at the next hearing, all the prominent directors sheepishly presented themselves in the company judge's court at Ahmedabad with much trepidation. Each one of the directors, though not legally bound to do so, but at the instance of the company judge, quietly offered his share of the company contribution to the employees' provident fund, and so made up the entire deficit! Justice according to law may have been a casualty, but justice, in the sense of what was right and proper, was done quickly and effectively.

From that time on, I confess that I had a somewhat sneaking regard for this out-of-the-ordinary judge – whom I had never met. He was a man to be watched. And watched he was. In September 1977, he was appointed to the Supreme Court – he was still not 58 years of age. When he packed his bags in Ahmedabad, he did not forget to take with him his social agenda, nor for that matter his deep and abiding concern for widows, the poor and the downtrodden. In one of his first judgments in the Supreme Court, delivered only a month after his appointment, Justice Desai set aside an order of confiscation of a small quantity of wheat and rice seized from the shop of a small owner in Mandsaur in Madhya Pradesh, whose licence to deal in foodgrains had already been cancelled.

The confiscation had been ordered by the collector. The appellate authority (the sessions judge) had said that it would be unjust to inflict the punishment of confiscating foodgrains worth about Rs. 50,000 over and above the penalty already imposed, which was the withdrawal of the business licence. The high court set aside the judgment of the sessions judge, holding that defaults under Essential Commodities Act should not be viewed lightly, and that when there was a breach of the foodgrain dealers' licensing order, confiscation, though an additional penalty, had to be imposed. Justice Desai (speaking for the Supreme Court) set aside the judgment of the high court and restored the judgment of sessions judge, on a questionable technicality – that the high court had no jurisdiction to interfere with the conclusions of the appellate authority under the Criminal

Procedure Code. This was obviously an overstatement – deliberately made. The real reason being revealed in the last two paragraphs of the judgment:

> 17. The facts are that the licensee is dead and he has left behind minor children and a widow. The licence having been cancelled, the business cannot be carried on. The security deposit is already forfeited … keeping in view all the factors, in our opinion the High Court was not justified in interfering with the order of confiscation.
>
> 18. Accordingly, this appeal is allowed and the order made by the High court is set aside and the one made by the Sessions judge is restored.

This exhibition of softness-at-heart was to permeate all his decisions, at all times, and in all manner of cases that reached the final court. He always looked gently and with compassion upon the cases of those whom Providence had not favoured. He was, in fact, the innovator of the idea that if justice cannot be done according to law, justice must be done despite the law. Incidentally, I think that we were fortunate to not have too many Desais on the bench because in a rule-of-law society, a surfeit of what is sometimes called 'palm-tree-justice' is apt to be misunderstood, and justifiably so.

In the Supreme Court, Justice Desai exemplified his philosophy in a judgment which became extremely controversial. I had the good fortune to appear in the case for the successful party. The name of the case was *Gujarat State Financial Corporation vs Lotus Hotel Pvt. Ltd.* (1983) – AIR 1983 S.C. 848. The Gujarat State Financial Corporation had most unreasonably refused to disperse the balance amount of a loan to a private hotel company which the corporation had undertaken to grant, under a written contract. The hotel remained incomplete. Lotus Hotels filed a writ seeking enforcement of this contractual obligation. The only substantial defence of the state corporation was a legal one – there could be no writ granted to enforce a contractual obligation. The law then was on the side of the corporation. In the year 1983, the law was that writs could not be issued against the state or statutory corporations for mere enforcement of a contract. The party had to resort to the remedy of a suit. This had been decided authoritatively by a bench of three judges of the Supreme Court (in Radhakishan Aggarwal's case – AIR 1977 S.C. 1496). And since Justice

Desai, who was hearing this case of Lotus Hotels, was sitting in a bench consisting of only two judges, the precedent was binding on him. But he turned a blind eye to precedent, since justice was not on the side of the corporation. He upheld the issue of the writ of mandamus!

Justice William J. Brennan – a judge who sat in the Supreme Court of the United States for years – always maintained that the role of the law and of the courts was to better the lot of mankind. Justice Desai was of the same view. And Desai always set his face against arbitrariness in any form of administrative or executive action. And he simply abhorred landlords as a class. In my opinion, this detracted from his otherwise fine achievements. His other obsession was that he could not decide – he could never decide and would never decide – a single case involving capital and labour, or employer and employee, in favour of the employer. This too detracted from his qualities as a judge. In Justice Desai's social agenda, landlords and employers were a class who could never succeed – who must not succeed – whilst he sat in court.

He was one judge who was truly innocent of that despicable but much too pervasive Indian taint – hypocrisy. As a refreshing contrast to most of our prominent figures, his public pronouncements and his private opinions always coincided. Whatever he did he did openly. He was always forthright, and (above all) at all times highly affectionate.

When a judge, Justice Desai did sometimes put a blind eye – the Nelson eye – to law and precedent. But I can cite precedent to excuse him; not judicial but a literary precedent, that of a great essayist, Ralph Waldo Emerson, who had written:

> Good men must not obey the laws too well.[42]

Obviously, Emerson's emphasis is not on the word 'laws', but on the words that follow, 'too well'.

Dhirubhai Desai was a good man and he did good things, but he did not obey the laws too well!

Notes and References

1. *Superintendent and Remembrancer of Legal Affairs, West Bengal vs Corporation of Calcutta*, AIR 1967 SC 997

2. 1959 SCR (Appendix) xvi

3. *Kharak Singh vs State of U.P.*, AIR 1963 SC 1295

4. (1975) 2 SCC 148

5. *Director of Rationing vs Corporation of Calcutta*, AIR 1960 SC 1355

6. *Superintendent and Remembrancer of Legal Affairs, West Bengal vs Corporation of Calcutta*, AIR 1967 SC 997

7. Dr Thomas Fuller (1654–1734), British physician and intellectual, who said more than 300 years ago, 'Be you ever so high, the law is above you.' These words were quoted by Lord Denning (the most celebrated English judge of the twentieth century) in a case brought by one Gouriet in 1977 when the attorney general refused to give him consent to institute relator proceedings to injunct the union of post office workers. When, during the Internal Emergency (June 1975 to March 1977), Lord Denning visited India on the invitation of the publishers of AIR (All India Reporter), he used this as the theme of his lectures!

8. AIR 1959 SC 107

9. *A. K. Kraipak vs UOI*, (1969) 2 SCC 262

10. (1980) 4 SCC 370

11. *State of Maharashtra vs Prabhakar Pandurang Sangzgiri*, (1966) 1 SCR 702

12. *A. K. Gopalan vs State of Madras*, 1950 SCR 88

13. *State of Maharashtra vs Prabhakar Pandurang Sangzgiri*, (1966) 1 SCR 702

14. *M. H. Hoscot vs State of Maharashtra*, (1978) 3 SCC 544

15. *Sunil Batra (I) vs Delhi Administration*, (1978) 4 SCC 494; and *Sunil Batra (II) vs Delhi Administration*, (1980) 3 SCC 488

16. *Francis Carolie Mullin vs Administrator, U.T. of Delhi*, (1981) 1 SCC 608

17. *ADM Jabalpur vs Shivakant Shukla*, (1976) 2 SCC 521

18. AIR 1965 SC 1096

19. AIR 1965 SC 1017

20. Article 31B of the Constitution saved all laws (central or state) placed in the Ninth Schedule from challenge under Articles 13, 14, 19 or 31; in effect, rendering all such laws entirely immune from constitutional challenge from any of the articles in the fundamental rights chapter.

21. AIR 1967 SC 637

22. AIR 1951 SC 458

23. *Sajjan Singh vs State of Rajasthan*, AIR 1965 SC 845

24. '31C. Saving of laws giving effect to certain principles – Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

    Provided that where such law is made by the legislature of a State, the provisions of this article shall not apply thereto unless

such law, having been reserved for the consideration of the President, has received his assent.'

25. The hearing of *Kesavananda Bharati* (1973 4 SCC 225) which comprised a court of 13 justices took well over three months.

26. *R. C. Cooper vs Union of India*, (1970) 1 SCC 248

27. See *Leaves from My Library: An English Anthology* (1986), Lord Denning, Butterworths, London, preface, pp. v–vi. The phrase comes from the Roman poet, Horace, who lived in the century before Christ.

28. (1974) 2 SCC 831

29. (1978) 1 SCC 447

30. *Qudrat Ullah vs Municipal Board*, (1974) 1 SCC 202

31. AIR 1966 S.C. 1987

32. *Union of India vs Sankalchand Himatlal Sheth*, (1977) 4 SCC 193

33. (1967) 3 SCR 525

34. *Maneka Gandhi vs Union of India*, 1978 (1) SCC 248

35. 1967 (3) SCR 525

36. AIR 1976 S.C. 1207

37. This was an application filed in the Bombay High Court for a declaration that there existed no valid and enforceable arbitration agreement between the petitioner (Soonawala) and the Respondent (Natvarlal) and that the persons who were appointed as arbitrators had no authority to decide disputes about transactions in between the petitioners under the Articles and bye-laws of the East India Cotton Association of which they were members. Justice J. C. Shah, sitting singly, decided that the

arbitrators had no authority to decide disputes pertaining to the legality of the contracts between the parties.

38. During the last 55 years, about 170 persons have sat as justices in the Supreme Court of India. Justice J. C. Shah himself delivered on behalf of the court or in dissent, 595 reported judgments – only to be out done by Justice K. Ramaswami whose score is 1,428! Impressive! But when I mentioned this to someone he enlightened me: Justice Ramaswami's reported judgments in appeals and cases decided was only 303, his 'orders' (also printed in the law reports) number 1,125.

39. *Constitutional and Administrative Law* (1986), Tenth Edition, E. C. S. Wade and A. W. Bradley, Longman, London and New York.

40. Author of the standard text book on interpretation of statutes: *Principles of Statutory Interpretation* (2006), Tenth Edition, Justice G. P. Singh, Wadhwa & Co., Nagpur.

41. *Express Newspaper and Others vs Union of India and Others*, 1986 (1) SCC 133

42. From one of Emerson's essays (on politics) published in 1844: 'Every actual State is corrupt. Good men must not obey the laws too well. What satire on government can equal the severity of censure conveyed in the word politic, which now for ages has signified cunning, intimating that the State is a trick?'

Chapter 15

Judicial Governance and Judicial Activism

That sometimes some men and women who sit on the bench are not conscious of the extent (or limits) of such power, or do not have the sensitivity to exercise judicial restraint when warranted, only means that those (few) men (and women) are just not equal to the supremely difficult task of judging entrusted to them under the Constitution. It only indicates that perhaps it is time we adopted a better method of selection of judges for our higher judiciary.

After reminiscing about some judges, I cannot avoid a topic uppermost in the minds of many citizens: 'judicial governance'. The more pejorative simile is 'judicial activism'. Ronald Dworkin, a great academic jurist, has a theory about the legitimacy of judicial governance. Present day judges, he says, who may have had nothing to do with the written Constitution when it was framed, by reason of their position as judges, become – and must act like – partners with the framers of the Constitution in an ongoing project – it is and will always be an ongoing project – to interpret a historical document in the best possible light.[1]

Dworkin has invoked the idea of a constitutional conception of democracy wherein judicial review occasioned by a charter of rights ensures the democratic pedigree of legislation by benchmarking the values found in the content of law, rather than in the process of lawmaking. For Dworkin, 'statistical democracy' – mere majority rule – has to be complemented by 'communal democracy' where political decisions must treat everyone with equal concern and respect, and 'each individual must be guaranteed fundamental civil and political rights'.

In the early 1980s, on the occasion of the twenty-fifth anniversary of the Charter of Rights in the Canadian Constitution, a spate of articles appeared in foreign journals. Amongst them was one published in the *Oxford Journal of Legal Studies*,[2] in which, a professor of Queen's University, Kingston, Ontario, offered a critical review of a recently published book called *A Common Law Theory of Judicial Review: The Living Tree*.[3] The author covered a broad range of disciplines – law, philosophy, political theory, constitutional theory and special interest – in his dissertation about the role of unelected judges in a democracy – particularly the role of the Supreme Court in shaping constitutional policy. The author sought to resolve the

impasse over the question of judicial review of written Constitutions. He described two groups – one group which upheld, and the other, which criticized the Canadian Charter of Rights – he called them the '*boosters*' and the '*bashers*'. For the 'boosters', the rigidity of the Constitution was what made it valuable (he said); for the 'bashers', this was one of the chief ills of a written Constitution!

Yet, according to the author of the book, neither approach is true of Constitutions. A written Constitution, he says, should be viewed as a 'living tree' with 'roots' in precedent and in the community's constitutional morality – a tree that has 'branches' and grows over time through evolving common law jurisprudence. The author (W. J. Waluchow) makes a convincing case of how this enables an approach to constitutionalism that is both authoritative and flexible. He says that the protection of rights must be left to traditional institutional mechanisms, which is necessarily the *unelected* judiciary.

All judicial review – all manner of adjudication by courts – is itself an exercise in judicial accountability – accountability to the people who are affected by a judge's rulings (if the punitive contempt power is kept well in check). That accountability gets evidenced in critical comments on judicial decisions when judges behave as they should (as moral custodians of the Constitution); the function they perform enhances the spirit of constitutionalism. My only regret sometimes is that some of our modern-day judges – whether in India or elsewhere – do not always realize the solemnity and importance of the functions they are expected to perform. The ideal judge of today, if he is to be a constitutional mentor, must move around, in and outside court, with the Constitution in his pocket, like the priest who is never without the Bible (or the Bhagavad Gita*)*. Because, the more you read the provisions of our Constitution, the more you get to know of how to apply its provisions to present-day problems.

The Supreme Court of India came into existence simultaneously with the Constitution – on 26th January 1950. In 1954, one of its first judges (Justice Vivian Bose) described, in elegant prose, what the constitutional provisions meant (and should mean) to the justices:

> We have upon us the whole armour of the Constitution and walk henceforth in its enlightened ways, wearing the breast plate of its protecting provisions and flashing the flaming sword of its inspiration.

The ‘flaming sword’ that Justice Bose contemplated is in Article 142 of this Constitution. It empowers the Supreme Court in exercise of its jurisdiction ‘to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it’. No other court in the country has this power. It has conferred this power deliberately on our highest court to stress the obvious viz. that the fount of justice under our Constitution is the apex court; that when on some rare occasions enacted law diverts the true course of justice, power is vested in the Supreme Court and in the Supreme Court alone, to make such orders as are necessary for doing complete justice. This is what the framers of our Constitution originally intended. This is the trust that the founding fathers placed in the justices of our highest court. My regret is that the justices of the highest court have, over the years (except for a flash-in-the-pan decision of the year 1991),[4] refused to accept the onerous responsibility placed on them, and have said – taking shelter under enacted law – that nothing can be done even by the highest court where the law stands in the way – justice (they now say) must pay obeisance to enacted law.[5] All very well in legal theory, but hopelessly wrong in conception. The only reason why this power was reserved, only to be exercised by the justices of the highest court was because they, above all others, were to be trusted more than any other judge in the entire country; they could not be expected to do wrong. This was the faith that the Constitution had in the justices of the Supreme Court – a faith unfortunately not shared or reciprocated by later justices of the Court in themselves!

Students and votaries of law (all lawyers and judges are students and votaries of law) should not pay lip service to ‘statistical’ democracy, which is the making of laws by elected legislatures elected on the basis of universal adult franchise, but to welcome with confidence ‘judicial governance’. Consider for a moment the Constitution of India, 1950. It is a detailed document, defining the three great organs of state: Parliament and state legislatures; the executive, central and state; and the higher judiciary (the high courts and the Supreme Court).

There is hardly any provision where the court’s scrutiny or jurisdiction is excluded. Yes, there are articles in our Constitution (they are few) where courts are not permitted to question what goes on in Parliament, and in turn

Parliament is not permitted to discuss or debate the conduct of sitting judges. But that's about all.

For a moment, do not bother to consider whether present (or past) judges of the high courts and the Supreme Court have lived upto the expectations of those who framed the Constitution – most of them have, some have not. But leave that aside for a moment, and just consider our basic document of governance and the reach of the overarching provisions: Article 32 (Right to Constitutional Remedies in the Supreme Court directly for enforcement of all fundamental rights), Article 226 (power of high courts to issue certain writs) and Article 227 (power of superintendence over all courts and tribunals by the high court). Whether politicians like it or not, these Articles do give primacy to the judges. The Constitution, as drafted and as it exists today, has placed the judges of the superior judiciary in the driving seat of Governance – Governance with a capital G.

It is true that the Constitution, although it makes separate provision for the three great organs of state, does not place them in air-tight compartments. Way back in 1955, the highest court had authoritatively said so – in Ram Jawaya's case (*Ram Jawaya vs State of Punjab* – AIR 1955 S.C. 549). It is one of the few important judgments of the court, delivered by Justice B. K. Mukherjea (when he was chief justice). B. K. Mukherjea's portrait hangs in Court No. 1, opposite to India's first chief justice (Sir Harilal Kania). Deservedly so; Mukherjea was appointed chief justice of India on 23 December 1954 on the retirement of his predecessor in office, Justice Mehr Chand Mahajan. But he (Mukherjea) may have been chief justice longer if he had responded to Prime Minister Jawaharlal Nehru's call that he (Mukherjea) take on the office of CJI after the retirement of Chief Justice Patanjali Sastri in January 1954. Mukherjea had then declined since in order of seniority it was Mehr Chand Mahajan's turn. When Nehru pressed him, Mukherjea said he would sooner resign than usurp the highest office before his turn! Mehr Chand Mahajan was thus duly appointed CJI (on the retirement of Justice Patanjali Sastri) on 4 January 1954, and it was only after Mehr Chand Mahajan retired at age 65 in December 1954 that Justice B. K. Mukherjea assumed the office of CJI. He was a judge long before my time – but amongst the first judges of the Supreme Court, he was (in the reckoning of all whom I have spoken to), perhaps, the greatest.

The facts in Ram Jawaya's case were as follows: the writ-petitioners were printers and publishers of text books for different classes in schools of

Punjab. The education department of the Punjab Government in pursuance of a policy of nationalization of text books had issued a series of notifications since 1950 regarding their printing, publication and sale which placed restrictions upon the fundamental rights of the petitioners to carry on their businesses guaranteed under Article 19(1)(g). The education department said that the restrictions were reasonable and were saved under Article 19(2). But the petitioners argued that no restrictions at all could be imposed on the petitioners' fundamental right to carry on trade or business guaranteed under Article 19(1)(g) of the Constitution by mere executive order without supporting legislation. This argument was negatived. In a unanimous opinion of the court, the Constitution Bench (presided over by Chief Justice B. K. Mukherjea) held that the Indian Constitution did not recognize the strict doctrine of separation of powers, and that the executive could exercise powers of departmental or subordinate legislation even absent enacted laws. However, orders issued by the executive could never be permitted to violate enacted law or to violate fundamental rights. The court said that the petitioners had no fundamental rights which could be said to have been infringed by the action of the government, because ordinarily it was for the school and college authorities to prescribe the text books which were to be used by students. Publishers of such textbooks had no right as to what should be prescribed as textbooks by school or college authorities.

A couple of years ago, when I spoke at a function in New Delhi on the separation of powers under the Constitution, I did so in the presence of the then Hon'ble Speaker, Somnath Chatterjee (former chief justice, J. S. Verma, presided). We had in the person of the speaker and the former chief justice of India, the two highest representatives (present and past) of the two great organs of government – Parliament and the courts. I said that in their august presence I felt like the priest who was newly appointed to his parish and who went to make a courtesy call on his bishop. The bishop welcomed the young padre and then solemnly instructed him that in all his Sunday sermons he should praise those who are in heaven, and never forget to condemn all those who are in hell. The priest shuffled a bit, and then gathered up courage to tell his bishop:

> I am sorry My Lord, I cannot do so. Because I have friends in both places.

I too have had friends in both places. I have spent six rich and eventful years with law makers (1999 to 2005) and learnt much from them, and I have also spent a professional lifetime with lawyers and judges. Having been on both sides of the fence, I think I can present a somewhat dispassionate view.

* * *

As to when judicial power should trump legislative and executive action, and when if at all parliamentary power can or should trump judicial power, the only truthful answer is: *it all depends*. It all depends on public acceptability of court decisions in high-profile cases. In India, the content and reach of judicial power is not defined – neither in our Constitution nor anywhere else. But in a Westminster-type Constitution like ours it is never so defined.

Some of my lawyer friends will recall Liyanage's case (1966).[6] This was a case which went up to the Privy Council from Ceylon (now Sri Lanka), which then had a Westminster-type Constitution like India's. In Liyanage's case, an ordinance was passed by the Government of Ceylon which prescribed that three prominent ministers who had taken part in an infructuous coup d'etat against the state – a coup that failed – should be tried, not by the established courts of the land but by a special tribunal of three judges. When this act was challenged as a usurpation of judicial power, a plea was made by counsel for government that unlike the US Constitution, this Westminster-type Constitution did not mention anywhere, nor recognize the concept of judicial power. But the Privy Council rejected the plea. After setting out the provisions of the Constitution of Ceylon (then a reflection of India's Constitution), the Privy Council said that:

> … although no express mention was made of vesting in the judicature of judicial power there was provision that Judges shall not be removable except by the Governor-General on an address of both Houses.

These provisions manifested (the Privy Council said) an intention to secure in the judiciary a freedom from political, legislative and executive

control.

> These provisions are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature.
>
> They would be inappropriate in a constitution by which it was intended that judicial power should be shared by the executive or the legislature.
>
> And then in words of purple prose the Privy Council went on:
>
> The constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature.

Simple as that – that is the reach of the judicial power under the Constitution of India as well.

The content of judicial power is not defined in our Constitution. It is assumed as having been conferred on the great chartered high courts (Bombay, Calcutta and Madras). The high court acts were passed in the year 1862, and this judicial power is now shared by the Supreme Court of India along with all the 21 high courts in the country.

Many believe that written constitutions that give power to the courts to strike down legislation made by a country's elected Parliament is undemocratic. It enables unelected judges (they say) to thwart the wishes of the elected representatives of the people in Parliament. There may be something to be said for this point of view. But it is too late in the day to complain. For nearly 60 years now, we have been working a Constitution which is federal in nature with allocated subjects of legislation separately and exclusively given to states and to the union. There is also a chapter on fundamental rights; all laws and executive actions inconsistent with them are expressly declared to be 'void'. In a controversy then, some authority would have to be the final arbiter. And that arbiter under our Constitution is ultimately the country's highest court.

It has been said that where there are no judicially manageable standards, our courts should not interfere. They should leave it to the elected representatives of the people. Theoretically speaking, this is correct – but what if the elected representatives fail to perform? What then?

Since 1950, 14 general elections to the Lok Sabha have been held and with all the publicity that is given to proceedings in Parliament, ordinary people – people who have voted their elected representatives into Parliament – remain today generally unsatisfied as to how members of our Parliament and also members of legislative assemblies function, if and when they function at all! Almost every session of Parliament during the last few years has been marred by some dispute or contention of the moment – not of any grave national importance. There is hardly any serious debate on topics of all-India concern! When I was in the Rajya Sabha, I noted that in two successive years an important measure like the annual Finance Bill was passed in each House of Parliament in a matter of minutes, without debate or discussion – amidst din and shouting. There is something wrong somewhere.

And the reason for what prime minister Dr Manmohan Singh recently characterized (in my humble opinion quite erroneously) as '*judicial over-reach*' is this – *all power grows by what it feeds on*. All judicial power also accretes by the mere circumstance that other constitutional bodies and authorities set-up to legislate and to pass administrative orders have failed to act when called upon to act. I suggest that the 'judicial over-reach', the prime minister spoke about, is the direct consequence of legislative and executive 'under-reach': i.e., poor performance in the making of laws and particularly in their execution. If judges need to introspect (and I confess that they do, and frequently too), politicians need doubly to introspect and ask themselves whether they have fulfilled the aspirations of the people who elected them to make laws for the people and help alleviate their problems.

If judges are to get off the backs of parliamentarians, politicians and bureaucrats – who claim the direct right to govern on the basis of adult franchise – they must come up with a much better record of performance. Only when they do, will the people of this great country give us back majority governments in the centre – as they did before the year 1980. In our constitutional history of 60 years, judicial power has kept vacillating –

contracting at times, expanding at times – according to the exigencies of the moment.

During the Internal Emergency of June 1975 upto March 1977, judicial power had contracted – almost to vanishing point, and one of those who fought against that Emergency was an eminent parliamentarian, Somnath Chatterjee, later honourable speaker, to whom liberty was the very blood of life. In his entire political life, Somnath Chatterjee had always fought against tyranny and religious bigotry – that was why he was opposed to the Emergency. Another was the lion of the Indian press – Ramnath Goenka, whose memorable case in the Supreme Court – *Indian Express* (1985) – I was privileged to argue. Yet another stalwart was my dear friend Cusrow Irani of the *Statesman* of Calcutta. They were amongst the bravest of the brave in those hard times: when judicial power under our Constitution was at its lowest ebb.

As I have said already, judicial power had contracted to its lowest level with the infamous decision in *ADM Jabalpur* (1976) when India's then chief justice proclaimed in a judgment – a judgment which needs to be overruled (but inexplicably has not been so far) – that:

> Liberty itself is the gift of the law, and it may by the law be forfeited or abridged.

This astounding statement was not controverted by three of the other judges who concurred with the chief justice. The fifth justice on the bench of five (actually the seniormost next to the CJI), Justice H. R. Khanna, alone dissented from the majority view. That is why Khanna's portrait hangs in Court No. 2 where he sat until he resigned because of what is now known as the 'Second Supersession' – Justice Beg (Judge No. 3) was appointed chief justice of India, and Justice Khanna in Court No. 2 demitted office. Incidentally, it was the majority decision in *ADM Jabalpur* that made MISA (Maintenance of Internal Security Act) sacrosanct and totally beyond all judicial review.

Fortunately for us, this concept of liberty propounded in *ADM Jabalpur* is not the rule *of* law on which our Constitution has been founded. It is the rule *by* law. If the rule *of* law is the rule by judges (as it is frequently said to be), and the rule *by* law is the rule of the elected representatives in Parliament without any possibility of that rule being questioned by the

judicial arm of the state, I for one can confidently say that I would prefer to live under a rule-*of*-law dispensation rather than under a rule-*by*-law regime.

I am glad that the pendulum swung away from Chief Justice Ray's grim dictum in the post-Emergency period when both courts and Parliament (mark you, even Parliament) said that Article 21 – life and liberty clause – can never be suspended and it is, I believe, by this single act of Parliament (when it amended our Constitution to provide that the right to life and liberty could never be suspended even during an Emergency) that has given supremacy to the judicial branch of government over all other branches.

Why? Because over the years, in one notable decision after another, the following rights have been declared by the Supreme Court to be encompassed within the four corners of Article 21 viz. the right to go abroad; the right to privacy; the right against solitary confinement; the right to legal aid; the right to speedy trial; the right against custodial violence; the right to medical assistance in an emergency; the right to shelter; the right of workers to safe working conditions and to medical aid; the right to social justice and economic empowerment; the right to pollution-free water and air; the right to a reasonable residence; the right of citizens to food, clothing, decent environment and even protection of the cultural heritage; the right of every child to full development; the right of residents of hilly areas to access roads; the right to education; the right to live in a clean city with noise pollution at minimum levels … an almost endless list of rights – in other words – the right of every inhabitant to live his or her life with dignity.

Recently (11 September 2007) the court has said that the right to life includes the right to opportunity, and therefore postulates the concept of a level playing field for all citizens – even when they are responding to something so prosaic and exclusively administrative – as government tenders.[7]

If this is the width of Article 21, can anyone wonder about the legitimacy of judicial governance? That legitimacy is written into Article 21 and other articles of the Constitution by that final interpreter of the Constitution, the Supreme Court of India.

In effect, a large number of Directive Principles of State Policy set out in Part IV of our Constitution, which have not been declared by the Constitution to be enforceable in any court (but nonetheless fundamental to

the governance of the country), have now been made enforceable by courts through the wide and liberal interpretation of Article 21 – a feat of judicial 'engineering' un-matched in any other part of the world.

You cannot have engineering without tools. And the tools have been provided by the founding fathers. The legitimacy of *judicial governance* is established by the provisions contained in four Articles of our Constitution – 21, 32, 226 and 227. Chief Justice Hidayatullah, long after he retired, when confronted with the doctrine of basic structure evolved by our judges, publicly said that the seed of this doctrine of basic structure was embedded in Article 32 of the Constitution. Dr B. R. Ambedkar had said much the same thing in the Constituent Assembly when the Constitution was framed. He said that Article 32 is 'the very soul of the Constitution and the very heart of it …' He called it 'the most important Article without which this Constitution would be a nullity'.

Take Article 226 – it empowers the Supreme Court and the high courts to issue writs, orders and directions not only for enforcement of fundamental rights but also 'for any other purpose'. And Article 227 is to keep tribunals within the limits of their authority. The width of Article 226 was emphasized by the Constitution Bench of our Supreme Court way back in 1955 when the court said:

> We can make any order, or issue any writ in the nature of certiorari in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law.

Mark the words, 'in all appropriate cases' and 'in appropriate manner'. Such exercise of power is always appropriate. Legitimate judicial power loses legitimacy when it is not exercised in an appropriate manner and in appropriate cases.

* * *

Chief Justice Sir Edward Coke proclaimed in England way back in the year 1615 that the power of courts was not only to correct errors and misdemeanours but all manner of misgovernment 'so that no wrong or injury, neither private not public, can be done, but that it shall be (here)

reformed or punished by due course of law'. These are the powers vested in India's superior judiciary.

That sometimes some men and women who sit on the bench are not conscious of the extent (or limits) of such power, or do not have the sensitivity to exercise judicial restraint when warranted, only means that those (few) men (and women) are just not equal to the supremely difficult task of judging entrusted to them under the Constitution. It only indicates that perhaps it is time we adopted a better method of selection of judges for our higher judiciary.

Persons who are 'prejudicially affected' by acts or omissions of any governmental or other authority – sometimes even 'strangers' – can approach courts for relief under Articles 32 and 226. India's constitutional historian, H. M. Seervai (in his *Constitutional Law of India*, 4th Edn., Vol. I, p. 381), has given what he describes as the most-striking illustration of strangers being granted relief under Articles 32 and 226. It is also perhaps the earliest of such instances viz. that of an unreported judgment of Justice Gandhi of the Bombay High Court (October 1975) in a writ petition filed by a public-spirited citizen, Piloo Mody. In *Piloo Mody vs State of Maharashtra*, the single judge of the Bombay High Court adopted a liberal and expansive view of locus standi long before the Constitution Bench of five judges did so in the First Judge's Case in December 1981 (*S. P. Gupta vs Union of India*). Piloo Mody had complained that the Bombay Government, through its three ministers, had leased out valuable plots of government land at a gross undervalue. The Bombay High Court judge rejected the state's contention that the petitioner had no locus standi to challenge the government order since he had nothing to do with the land. The judge upheld the petitioner's contention that the leases were granted mala fide at a gross undervalue. He then directed that the lessee who obtained the leases should pay 33.33 per cent more rent to the government. The state of Maharasthra gained a rent increase of Rs.1 crore per year for 99 years as a consequence of a writ filed by a stranger – a distinguished one at that. It was the decision in Piloo Mody's case that gave fresh impetus to the concept of PIL, which has been since then frequently used (though sometimes also misused/abused). It is the misuse (or abuse) that requires correction, not by abolishing PILs, but by laying down norms and framing strict guidelines for ensuring that such PILs are not improperly motivated.

I do not subscribe to the view that there has to be necessarily a 'balance of power' maintained between the three organs of the state. But I am definitely of the view that judicial power, howsoever defined, cannot be trenched on either by Parliament or state legislatures or by the executive at the Centre or in the states.

Do remember how it was so trenched on when the Ninth Schedule to our Constitution was deliberately added way back in 1951 by the Constitution First Amendment Act, which provided that all laws – central or state – which Parliament chose to put in a schedule to the Constitution – the Ninth Schedule – were to be totally immune from all judicial review for violation of fundamental rights. Even if such laws did violate any fundamental rights and had even been struck down by courts, all such laws got automatically revived, and were to continue as valid! This total denial of judicial power enacted by Article 31B[8] was tolerated only because the laws that were initially put in the Ninth Schedule were land-reform laws. But later judgments of the Supreme Court said that laws which were placed in the Ninth Schedule were not confined only to land reforms. And what happened? Taking advantage of this pronouncement by the highest court, the government of the day (the GOI) – during the period of the Internal Emergency in 1975:

- First, put MISA (the dreaded security law) also in the Ninth Schedule, making its noxious provisions impervious to all judicial review;
- And next, enacted the Prevention of Publication of Objectionable Matter Act, 1976, an act to control and muzzle the free press, and also placed that act in the Ninth Schedule!

It is only when the Internal Emergency was lifted (thank God it was) and elections were held, and the Janata government came to power on a wave of popularity – as a backlash to the Internal Emergency – that a new Parliament (mark you, Parliament itself) deleted MISA from the Ninth Schedule (a truly remarkable achievement) and repealed the Press Gagging Act, i.e., it left the 'life and liberty clause' and 'freedom of the press', guaranteed by Article 19 (1) (a), virtually free of all executive and legislative constraints.

This was done by (a strong) Parliament with an overwhelming majority of elected members belonging to one single party. Because they were right-thinking, they knew and believed that freedom (for citizens like you and me) can only be secured through courts – not through Parliament or executive governments.

But then consider what happened three years ago (in the year 2006), when the Supreme Court considered (in Coelho's case[9] and in a companion case) the width of the basic structure doctrine before a bench of nine judges. Arguments were solemnly advanced on behalf of the Union of India (yes, on behalf of those even now in charge of the Government of India) that Article 31B was amenable to more enacted laws being put in the Ninth Schedule – not necessarily land-reform laws – and so avoiding all constitutional scrutiny! It was said by counsel appearing for the GOI that enactments of state legislatures (or of Parliament) even if they were enacted contrary to the Fundamental Rights Chapter, could be lawfully put into the Ninth Schedule – thus ensuring complete immunity from challenge! I was lead counsel for the Coelhos and contested this. Senior counsel Harish Salve appeared for another group of petitioners in support. Fortunately, we succeeded. In a statesmanlike decision of a unanimous court delivered by Chief Justice Sabharwal (the arguments took only five working days), the court ruled against the GOI. The nine-judge bench said that the basic structure test did not exclude a consideration of the provisions of the fundamental rights chapter. The arguments on behalf of the Union of India were a typical attempt at 'executive over-reach'. The real reason was that the government of the day was anxious to place in the Ninth Schedule the Delhi Laws (Special Provisions) Act, 2006 – which had suspended by legislation, for a limited period of one year, the sealing of premises which had been expressly authorized by orders passed by the Supreme Court! Because of the Supreme Court's decision in Coelho's case, Article 31B is no longer the 'black-hole' of the Constitution that the GOI wanted it to be.

* * *

I vividly recall what Swaran Singh – India's foreign minister in Indira Gandhi's government – said during the dark days of the Internal Emergency of June 1975. He was appointed chairman of the Constitution Committee

which included three prominent practising lawyers, and their specific mandate was to clip the wings of the high courts by proposing amendments to Article 226 – the great searchlight provision in our Constitution. It is really a searchlight for ferreting out injustices in individual cases and passing appropriate remedial orders. Swaran Singh told his colleagues that when he was himself a minister in the Punjab Government, he found that as a minister it was just not possible to render justice in individual cases because of the pressures and pulls of party politics, and that it was far better that courts were left to do the job.

He was the one person – a non-practising lawyer – who set his face against abolition of Article 226, and we all should be truly grateful to him for having saved the writ jurisdiction of the high courts. It was the practising lawyer – politicians on that Constitution Committee who so fervently wanted to scrap Article 226! The moral of this story is that we should avoid relying on high-profile lawyers (with political inclinations) because with their argumentative skills, they are able to rationalize all forms of tyranny.

I do not think it is fair or permissible to speak about the omnipotence of Parliament in all things, nor to talk about clipping the wings of the judicature or saying that judges are going too far. By saying so, you dishonour the Constitution and the founding fathers.

Yes, you may criticize this or that judgment of the Supreme Court (I frequently do) or judgments of the high courts which have needlessly interfered – in the course of so-called PILs – with the day-to-day governance of the country which ordinarily ought to be left to the elected representatives or those administering the laws. It is such PILs that have given our higher judiciary a bad name.

If the PILs had retained the character which first prompted the Supreme Court to recognize them, there would have been no problem viz. to afford to the poor and indigent a foothold and an audience in courts – that was in fact the original intention. But now some PILs have wormed their corrupted way into all walks of public life.

These PILs ask courts to pronounce on this or that administrative or executive policy (sometimes at the instance of some hidden hand); and some judges in some courts appear to be willing to oblige.

Anthony Lester (Lord Lester), England's leading lawyer, once gave the modern-day version of Lord Acton's famous phrase, 'Power corrupts and

absolute power corrupts absolutely.' Lord Lester said that some judges in England have a variant to this – they say that, 'Judicial power is wonderful and absolute judicial power is absolutely wonderful.' He said it in jest, of course, but some judges in India do believe and sometimes act as if absolute judicial power is absolutely wonderful. This is what gives judges a bad name; it is then that they are likened to 'Emperors', which they are definitely not.

Two years ago (in 2008) that maverick friend and colleague of mine, Ram Jethmalani, said in court, in a case where we were appearing on the same side – and which involved a scam in the telecom sector – that Lord Acton's aphorism ('Power corrupts and absolute power corrupts absolutely') needed adaptation in India with elections around the corner in the year 2009 viz.:

> All power corrupts – *and the fear of losing power corrupts absolutely*!

'Ample judicial power administered with ample judicial wisdom' is the need of the hour; not a curtailment of judicial power, but maturer wisdom in its administration.

No, we don't need judges who behave like 'Emperors'. What we do need are those

> whom the lust of office does not kill;
> whom the spoils of office cannot buy;
> who possess opinions and a will;
> who have honour; and will not lie;
> who can stand before a demagogue.
> And damn his treacherous flatteries without winking
> Tall Men (and women), sun-crowned, who live above the fog
> In public duty and in private thinking …[10]

Notes and References

1. *Law's Empire* (1986), Ronald Dworkin, Harvard Law University Press, Cambridge, pp. 61–63.

2. *Oxford Jounral of Legal Studies*, Vol. 27, No. 4, November 2007, London.

3. *A Common Law Theory of Judicial Review: The Living Tree* (2007), W. J. Waluchow, Cambridge University Press, London.

4. *Delhi Judicial Service vs State of Gujarat*, AIR; 1991 SC 2176

5. *Union Carbide Corporation vs Union of India*, 1991 (4) SCC 584; and *Supreme Court Bar Association vs Union of India*, AIR 1998 SC 1895

6. 1966 (1) All England Reports 650 (Opinion of Lord Pearce speaking for their lordships of the Privy Council)

7. *Reliance Energy Ltd. vs Maharashtra State Road Development Corporation Ltd*. – 2007 (8) SCC 1

8. Article 31B, as inserted in the Constitution by the Constitution (First Amendment) Act, 1951, reads:

31B. Validation of certain Acts and Regulations – Without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away of abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

9. *I. R. Coelho vs State of Tamil Nadu* – 2007 (2) SCC 1

10. From *Life of Abraham Lincoln* (1998), Josiah Gilbert Holland, Bison Books Publisher. The poem in the book was penned by the

author, and was frequently quoted by Nani Palkhivala in his speeches; it ends with these ominous words:

For while the rabble, with their thumb-worn creeds,
Their large professions and their little deeds,
Mingle in selfish strife, lo! Freedom weeps,
Wrong rules the land and waiting Justice sleeps.

Chapter 16

A Case I Won – But Which I Would Prefer to Have Lost

I don't see what is so special about the first five judges of the Supreme Court. They are only the first five in seniority of appointment – not necessarily in superiority of wisdom or competence. I see no reason why all the judges in the highest court should not be consulted when a proposal is made for appointment of a high court judge (or an eminent advocate) to be a judge of the Supreme Court. I would suggest that the closed-circuit network of five judges should be disbanded.

If there is one important case decided by the Supreme Court of India in which I appeared and won, and which I have lived to regret, it is the decision that goes by the title – *Supreme Court Advocates-on-Record Association vs Union of India*.[1] It is a decision of the year 1993 and is better known as the *Second Judges Case*. But what about the *First Judges Case*; how did that come about? Well, let me start from the beginning.

More than 20 years ago (on 13 December 1985), the UN General Assembly adopted, without a dissenting vote, a set of basic principles on the independence of the judiciary. How the judges should be appointed was left to the Constitution of individual states – the only safeguard being that the independence of the judiciary had to be guaranteed by the state, and enshrined in the Constitution or the laws of the country. Persons selected for judicial office had to be individuals of integrity and ability with appropriate training or qualifications in law, and any method of selection (no particular method being prescribed or recommended) had to safeguard against judicial appointments being made 'for improper motives'. It was also provided that judges whether appointed or elected shall have guaranteed tenure until the mandatory age of retirement.

As mentioned in an earlier chapter, our Constitution was adopted by the Constituent Assembly way back on 26 November 1949 (Law Day), and promulgated on 26 January 1950. It provided that the Government of India (the appointing authority) is to appoint judges of the Supreme Court and of the high courts after consultation with the chief justice of India, and with such other judges and authorities mentioned in Articles 124(2) and 217(1):

In respect of judges of the Supreme Court of India, Article 124(2) provided:

> (2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.

In respect of judges of the high courts, Article 217(1) provided:

> (1) Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court; and shall hold office in the case of an additional or acting Judge as provided in Article 224, and in any other case until he attends the age of sixty-two years.

The prescribed mode of appointments worked well, but only during the first decade after 1950. Between January 1950 and November 1959, 19 judges were appointed to India's Supreme Court and every one of them was appointed on the recommendation of the chief justice of India. As far as high courts were concerned, 211 appointments were made in the same period since 1950, and out of these all except one – 210 out of 211 – were made on the advice and with the consent and concurrence of the chief justice of India.[2]

However, things changed with the Supreme Court's literal interpretation of the property clause of our Constitution beginning with decisions in the 1960s, which were years of conflict between Parliament and the superior judiciary. Under Article 31, as it originally stood in the 1950 Constitution, no person could be deprived of his property save by authority of law, and no property could be taken without payment of 'compensation'. In a series of decisions, vehemently contested by the Government of India, the Supreme Court said that 'compensation' meant 'full compensation' – as the American courts had said: 'compensation' meant 'a just equivalent' for the property taken. This almost set at naught the government's avowed policy of abolishing the old zamindaris because the country just could not afford to

pay the zamindars the full worth of vast lands taken over as a measure of agrarian reform.

It was felt in the highest echelons of the government that judges of the Supreme Court had become 'property-minded', out of tune with society, and that it would be appropriate if there were henceforth appointed on the highest court 'forward-looking' judges – judges who subscribed to the economic policies of the government. The government at the time was a majoritarian government composed of members of the single largest party in Parliament (the Congress) – a party that commanded a majority sufficient to secure the passage of almost any constitutional amendment.

It was at this time that the country witnessed the sorry spectacle of what were then known as the 'Band–Wagon–Judges', who were craving attention of the Executive, asserting in speeches and even in their judicial pronouncements that they were extremely 'forward looking'! Even some chief justices of high courts were not averse to falling in line with government's views as to the suitability or unsuitability of particular names for judicial appointment. A climate of 'executive compliance' prevailed – so much so that the law secretary of the Union of India could quite truthfully say in a sworn affidavit filed in the *Second Judges Case* (1994) that in the ten years from 1983 to 1993, out of a total of 547 appointments of judges made to the high courts, only seven were not in consonance with the views expressed by the chief justice of India!

Alas, some (fortunately, not many) of these chief justices were like that Lady of Kent (in the old limerick) – '*who said she would not go but she went*'. In other words, these personages, after saying at first that they would not go along with the appointees suggested by the government, ultimately did so or were persuaded to do so.

I was not privy to the confabulations that took place during these years between the succession of chief justices on the one hand and the executive on the other. But one thing was clear – the constitutional 'consultations' that took place in the 1970s and 1980s was definitely not according to the convention which prevailed in the 1950s: which was that the executive implicitly accepted the 'advice' of the chief justice of India as to the persons who should be appointed judges in the higher judiciary.

Then, in 1981, a bench of seven judges of the Supreme Court of India said in S. P. Gupta's case[3] (a case which later came to be popularly known, or unpopularly known – depending on your point of view – as the *First*

Judges Case) that the recommendation of the chief justice of India in the matter of the appointment of judges of the higher judiciary was not *constitutionally* binding on the Government of India. This was the opinion of a narrow majority (4:3). In the majority were: Justices P. N. Bhagwati, Fazal Ali, D. A. Desai and E. A. Venkataramiah, and in the minority were: Justices A. C. Gupta, V. D. Tulzapurkar and R. S. Pathak. The majority decision may have been constitutionally correct, but it was definitely not in accordance with *constitutional convention*. The majority said:

> That where there is difference of opinion amongst the constitutional functionaries in regard to appointment of a Judge in a High Court, the opinion of none of the constitutional functionaries is entitled to primacy but after considering the opinion of each of the constitutional functionaries and giving it due weight, the Central Government is entitled to come to its own decision as to which opinion it should accept in deciding whether or not to appoint the particular person as a Judge. So also where a Judge of the Supreme Court is to be appointed, the Chief Justice of India is required to be consulted, but again it is not concurrence but only consultation and the Central Government is not bound to act in accordance with the opinion of the Chief Justice of India though it is entitled to great weight as the opinion of the head of the Indian Judiciary. The ultimate power of appointment rests with the Central Government and that is in accord with the constitutional practice prevailing in all democratic countries.

But the majority also said:

> But even with this provision (Article 124 (2)), we do not think that the safeguard is adequate because it is left to the Central Government to select any one or more of the Judges of the Supreme Court and of the High Courts for the purpose of consultation. We would rather suggest that there must be a collegium to make recommendations to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be more broad based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities

> required for appointment and this last requirement is absolutely essential – it would go a long way towards securing the right kind of Judges, who would be truly independent in the sense we have indicated above and who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity. We may point out that even countries like Australia and New Zealand have veered round to the view that there should be a Judicial Commission for appointment of the higher judiciary. As recently as July 1977 the Chief Justice of Australia publicly stated that the time had come for such a commission to be appointed in Australia. So also in New Zealand, the Royal Commission on the Courts chaired by Mr Justice Beattle, who has now become the Governor-General of New Zealand, recommended that a Judicial Commission should consider all judicial appointments including appointments of High Court Judges. This is a matter which may well receive serious attention of the Government of India.

No attention was given by GOI to the latter quote. The decision in the *First Judges Case* proved to be a disaster for 'judicial independence'. Since the first quote was given undue emphasis by the government, it enabled successive governments to 'manipulate' appointments. As for instance in the case of appointment of a judge to a high court, when in the case of some names recommended by the executive, the chief justice of India stood firmly against them, the central government attempted to persuade the chief justice of the concerned high court to fall in line with the government's choice. As also in the case of an appointment of a judge to the Supreme Court, the government would 'consult' with other judges of the Supreme Court whose views differed from the views of the incumbent chief justice of India and proceed to appoint persons recommended by the other justices. This created a rift in the echelons of the higher judiciary.

The citadel never falls except from within, and the reason why it nearly fell from within was because of that 'unfortunate', though otherwise constitutionally correct, decision in the *First Judges Case* (1981).

When Justice P. N. Bhagwati, who delivered the majority judgment in the *First Judges Case*, became chief justice of India in July 1985 (the next seniormost judge in the Supreme Court being invariably appointed chief justice of India),[4] his recommendation of names of judges to be appointed

in the highest court (and in high courts) was not accepted by the GOI. The government relied on his own (Bhagwati's) majority judgment in the *First Judges Case*! At the end of his tenure, Chief Justice Bhagwati chafed quite a bit at the government's refusal to accept the names proposed by him – names that were otherwise deserving.

* * *

After several years of the government's reaction to the majority judgment in the *First Judges Case*, new appointees on the Supreme Court resolved to take a fresh look at the relevant articles of the Constitution. The new appointees were: Justices S. Ratnavel Pandian, A. M. Ahmadi, Kuldip Singh, J. S. Verma, M. M. Punchhi, Yogeshwar Dayal, G. N. Ray, Dr A. S. Anand and S. P. Bharucha. These justices came to the conclusion that it was time to review the correctness of the ratio of the majority decision in the *First Judges Case*.

This is where I come in. I had led the main argument on behalf of the petitioner, *Supreme Court Advocate-on-Record Association*, in the *Second Judges Case*,[5] most ably assisted by the then Advocate-on-record, Mukul Mudgal (later judge of the Delhi High Court and now chief justice of Punjab and Haryana). We ultimately succeeded, but the fallout was not at all as we had expected.

What the *Second Judges Case* decided in 1993 (by a majority of 7:2) was not the status quo ante before 1981, but it was – as the Americans would call it – an entirely new 'ball game'! Primacy of the chief justice of India, on which the whole edifice of an independent judiciary under our Constitution had rested, had proved disastrous during the Internal Emergency of June 1975 to January 1977 – during which period Chief Justice A. N. Ray had directed transfers of judges from one high court to another, not on the basis of exigencies of work in one high court (or the other), but solely because these judges had decided certain important cases which had political overtones against the central government or the relevant state government. They were and became known as 'punitive' transfers.

It was in this background that the majority in the *Second Judges Case* said that they would not endorse the prevailing doctrine of the primacy of the chief justice of India alone. The spectre of Chief Justice Ray's

appointments and transfers (particularly transfers) lay heavily on the consciences of the judges. So the bench 'evolved' – or more appropriately 'innovated' – a new doctrine.

Justice Verma[6] said (in the *Second Judges Case*) that the reason given by the majority in S. P. Gupta's Case (*First Judges Case*) could not be supported, and was not in accordance with existing practice, and that the doctrine of primacy would henceforth mean the opinion of the chief justice of India after taking into account the views of his two senior colleagues required to be consulted by him for formation of a *collegiate opinion*. The opinion of a collectivity of judges was to be preferred to the opinion of the first among equals, the CJI. In the *Second Judges Case*, the idea of a 'collegium' (initially projected in the *First Judges Case*) was given effect to – with one caveat: if the government did not accept the recommendation of the 'collegium' it would be presumed that the government had not acted bonafide!

In the *Second Judges Case*, the majority held that the court's prior decision of 1981 (in the *First Judges Case*) was erroneous and it was overruled. The Constitution was not to be interpreted literally (the majority said) – a 'contextual' and 'purposive' construction was to be preferred. However, the interpretation of Article 124 (and Article 217) by the majority in the *Second Judges Case* was neither 'contextual' nor 'purposive'. There was nothing in the language of the constitutional provision or in the debates in the Constituent Assembly that indicated that the founders ever contemplated that judges were to be entrusted with the power to select judges.

It appeared to many that the court had harkened to Omar Khayyam's prayer in the Rubaiyat:[7]

> Ah, Love! Could thou and I with Fate conspire
> To grasp this sorry Scheme of Things entire,
> Would not we shatter it to bits – and then
> Re-mould it nearer to the Heart's Desire!

Article 124 and Article 217 were, by judicial diktat, remoulded closer to the heart's desire of the judges.

The decision in the *Second Judges Case* was adversely commented upon, not only in India, but even by judges abroad when they came and spoke in

India. The trenchant (but guarded) title of a speech in Delhi by Lord Robin Cooke on the subject, 'Where Angels Fear to Tread' was taken from a famous line of an eighteenth-century English poet, Alexander Pope,[8] which read: 'For fools rush in where angels fear to tread'. Robin Cooke contented himself with repeating only the latter half of Pope's line hoping that most people in India (ignorant of Alexander Pope or his writings) would not be affronted at the jibe against the judges!

Even after the judgment in the *Second Judges Case* (1993) which reconstructed Article 124(2) in the guise of interpreting it, it is now no secret that selections could not be implemented in the *spirit* in which the new doctrine was propounded. This time only because the collegiate of three highest constitutional functionaries (the seniormost judges on the court) could not always see eye to eye in matters of appointments of judges!

In one case, for instance, where a chief justice of a high court was recommended for appointment to the Supreme Court of India by two in the triumvirate (of the judicial collegium), the CJI (re-asserting the old notion of primacy of the CJI) said *no*, supporting his negative answer with written opinions of two other junior colleagues of his own on the court (an expedient not contemplated in the *Second Judges Case*!). This actually happened.

* * *

The truth is that, although good, competent, honest men and women have been appointed to the superior judiciary under this judge-evolved doctrine (alas, women have been too few – not even a handful – in 60 years),[9] many able, competent persons (of like unimpeachable integrity) have been passed over for wholly unknown reasons simply because there is *no institutionalized system for making recommendations*; no database or referral record of high court judges who are considered suitable for appointment as judges of the Supreme Court.

When Justice Punchhi became chief justice of India in January 1998, and suggested, with the concurrence of his two seniormost colleagues (the collegium), that a particular list of five named persons be appointed in the vacancies to the highest court (all strictly in accordance with the methodology laid down in the *Second Judges Case*), the government,

having genuine reasons to doubt the suitability of one or two of the names in that list, dragged its feet. Other disinterested but knowledgeable persons were alarmed at one or two of the names recommended by the CJI for appointment to the apex court.

The Government of India then suggested to the CJI that some of the names suggested by him could be accepted but not all. However, the chief justice was adamant. He said, 'No – it is all or nothing.' There were apprehensions of possible 'contempt' proceedings being initiated *suo motu* against the executive if the CJI's en bloc proposal was not accepted!

Ultimately, simply to avoid a possibly ugly situation from developing, a reference was filed by the government in the name of the President of India for the advisory opinion of the Supreme Court, under the provisions of Article 143 of the Constitution of India[10] for 'clarification' of some dicta in the *Second Judges Case* (it was one of the most futile presidential references ever filed by the Government of India). It was what I might describe – without meaning any discourtesy to any one of the actors in the drama that followed – plainly an 'Anti-Justice Punchhi Reference'! Just as the first amongst equals could not always be trusted to make the right choice, it now appeared to us that even the first three could not always be trusted as well!

At the hearing of the presidential reference in this, the *Third Judges Case* – before a bench of nine judges[11] – the government of the day expressly stated to the court that it was not asking for a re-consideration of the decision of the majority in the *Second Judges Case*. In other words, it was not asking that there should be a national judicial commission for appointment of judges of the higher judiciary, nor was it laying any claim to disagree or disapprove names selected for appointment by the collegiate consisting of the chief justice of India and his seniormost colleagues.

In the result, nothing great was achieved in the presidential reference. A few 'creases' were ironed out and the collegium was enlarged (by judicial fiat) from three to five of the seniormost justices on the highest court on the (somewhat dubious) principle that there was *greater* safety in *larger* numbers! Meanwhile, Justice Punchhi had retired at age 65, and the successor CJI (with four of his colleagues) recommended suitable names that were acceptable to all.

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The criticism of the dictum in the *Third Judges Case* (1998) has been that the system of recommendation for appointments by a collegium of five seniormost judges (like that of three that went before) has also not been institutionalized. No mechanism has been evolved (by the collegium itself), nor has any criteria been laid down as to who amongst the high court judges (who must retire at 62) – all aspirants to a place in the Supreme Court – should be recommended.

* * *

I don't see what is so special about the first five judges of the Supreme Court. They are only the first five in seniority of appointment – not necessarily in superiority of wisdom or competence. I see no reason why all the judges in the highest court should not be consulted when a proposal is made for appointment of a high court judge (or an eminent advocate) to be a judge of the Supreme Court. I would suggest that the closed-circuit network of five judges should be disbanded. They invariably hold their 'cards' close to their chest. They ask no one. They consult no one but themselves. This has been the pattern of functioning for years. In sharp contrast, Chief Justice J. S. Verma (who had structured and authored the decision in the *Second Judges Case*) frequently consulted senior advocates (including myself) as to appointments that the collegium headed by him would like to recommend and took into account their views (though he did not necessarily accept them). In fact, he later told me that he had recorded our views on the files. This is what he had always intended chief justices to do when he gave (in the *Second Judges Case*) the collegium, headed by the chief justice, vast powers of selection. I would suggest that if there is to be a collegial appointment (as under the present system) – and I am afraid that, like the poor, the system will be with us for a long, long time – it must be after a broad consensus from amongst all judges of the Supreme Court, and whosever else the CJI considers it appropriate to consult. There must be far more inputs from outside the select coterie of five judges.

As I have mentioned before, it is not that good judges were not, or are not, appointed to the Supreme Court under the present 'collegium' system – they invariably are. But sometimes better judges are overlooked or ignored.

Without mincing words, let me illustrate this by an instance from Bombay itself. I have said this before and I have written about this as well. Without naming names, instances are not worth mentioning. Justice M. L. Pendse of the Bombay High Court, transferred for a while as CJ of Karnataka, who resigned office in March 1996, was a fine judge; he *delivered* justice without *delaying* it.

Justice Manoj Kumar Mukherjee, when he was a sitting judge in the Supreme Court, told me (on more than one occasion) when I mentioned to him the name of Pendse as a fit person to be brought to the apex court that Pendse was (in his opinion) the best high court judge in the country. I told him, 'Please mention this to the Chief Justice.' He told me that he had already done so! Yet – I regret to say that Pendse had been successfully prevented from coming to the Supreme Court, for what I regard as petty reasons:

First, because he was 'disobedient', since when he was first asked to go from Bombay to Karnataka as chief justice he declined (for personal reasons), incurring the displeasure of the then chief justice of India (he went only when he was sternly told to accept the order of transfer); and second, because of the 'Bombay Lobby' which was against his elevation. By the 'Bombay Lobby' I mean the judges from Bombay then in the Supreme Court. The chief justice of India can always ask his colleagues on the bench of the Supreme Court – colleagues from Calcutta, Bombay, Allahabad or other high courts – as to the merit or demerit of someone from that high court being considered for elevation. But my plea is (and always has been), 'Please, chief justice, do not rely implicitly on the assessment of your colleagues who hail from that high court.' The assessment could be (and often is) warped or tainted – sometimes when you know a person too well, you are apt to give an exaggerated opinion of some of his/her qualities – good or bad, more often, bad!

So, over the years, my assessment is that although many of the recommendations of this five-member collegium have been '*good*', some have been '*not so good*' or '*could have been much better*'; and more recently, at least one has been (in the opinion of many) positively '*bad*' – '*should never have been made*'. I am afraid that this is the result of the collegium not doing its homework. 'Homework' is most important when picking judges for the highest court.

So, nothing has worked well – neither the system of appointments between 1981 and 1992 (where government had the veto), nor the post-1993 system of appointments (where three and later five seniormost judges of the court had the right to recommend judges for appointment).

But then, is the National Judicial Commission the right answer? I sincerely hope so. Will there not be more confusion in even greater numbers? Perhaps, there will be or perhaps not – only time and experimentation will tell. The idea of a National Judicial Commission is an excellent one, but it has somehow not passed muster with Parliament on three separate occasions:

> First, when the 67th Constitution (Amendment) Bill of 1990 was introduced by Law Minister Dinesh Goswami on 18 August 1990 in the Lok Sabha, pursuant to the recommendations of the 121st Law Commission Report. But the idea of a National Judicial Commission which the Bill envisaged could not be pursued since the government of Prime Minister V. P. Singh resigned in November 1990.
>
> Second, when during the regime of the successor government of Chandrasekhar – Constitution Amendment Bill (Bill No. 54 of 1990) was prepared by Law Minister Ram Jethmalani (also making provision for a National Judicial Commission); it could not even be introduced in the Upper House since Prime Minister Chandrasekhar prematurely resigned after support to his government was withdrawn by the Congress Party, and fresh elections were called soon after.
>
> Third, an attempt was made by the Constitution 98th Amendment Bill, 2003 (prepared by Law Minister Arun Jaitley), again seeking to amend Articles 124 and 217 of the Constitution to introduce the concept of a National Judicial Commission, but this Bill lapsed with the dissolution of the 13th Lok Sabha in the year 2004.

In that bastion of judicial conservativeness (the United Kingdom) when the last lord chancellor of England had mooted proposals for greater 'people participation' in the selection of judges, a question was raised as to who would be the 'right' people? Selection on merit to the higher judiciary in England is no longer restricted to persons who are invited to accept; posts of judges of the higher judiciary are now advertised, to be responded to by

written applications by persons who are desirous of being appointed high court judges.

I believe the answer, in this country, to the question concerning the ideal system of appointment lies not necessarily in the number or type of persons who select (or recommend), nor in the range of persons entitled to select (or recommend). What is important is that there must be greater transparency in the method and procedure of appointment of judges to the higher judiciary. There must be much greater care bestowed in making recommendations to the highest court, as under our Constitution it is the Supreme Court of India that is the final interpreter of the Constitution and of all laws.

By transparency in the method and procedure, I do not imply that there should be publicity. Once systems are in place and the method and procedure of appointment is known, the confabulations within the judiciary must be left to the justices without the intruding eyes of members of the public or the media. The problem today – as also the problem that was there yesterday and the days before – is that not enough attention is given by successive collegiums to the important task of recommending judges for appointment to the Supreme Court, simply because the five judges at the top are too busy deciding cases that come before them.

I recall that much greater care used to be adopted in the past in selecting judges. In the late 1970s, when I (as private counsel) had gone to argue an appeal before a bench of the Kerala High Court, I had to make several trips. The presiding judge was Justice V. Balakrishna Eradi. Ultimately, he decided the case (that I was appearing in) against my client. However, I was at that time impressed by his acumen and competence, and I came back to Delhi and told Justice N. L. Untwalia, a sitting judge of the Supreme Court, about him. He promptly went and told Chief Justice Y. V. Chandrachud, who requested Untwalia to go to Kerala in the ensuring Diwali vacation and make discreet inquiries from judges and from members of the Bar. The collectivity of the Bar is the best judge about who deserves to be appointed to the Supreme Court – just as the collectivity of judges are the best judges about the competence and skill of practising lawyers. When Justice Untwalia returned he agreed with my assessment. Chief Justice Chandrachud (this was in the era of ‘primacy of the chief justice’) then recommended Eradi’s name to the government and he was promptly appointed. Justice Eradi, for several months after he moved to Delhi, told all and sundry that ‘it was Nariman who got me appointed to the Supreme

Court'! I say this not in order to flaunt my (wrongly) presumed influence with the powers-that-be (I had none and have none), but only to stress that the most important consideration for appointment of any person as judge of the Supreme Court is to make all possible inquiries (from all possible sources) and then, and only then, recommend his/her name.

I also recall that Chief Justice R. S. Pathak (chief justice from 1986 to 1989 – during the era of 'primacy of the chief justice') took his role of recommending names to the Supreme Court Bench very seriously. On his frequent travels to various cities, he would assess the work and worth of individual judges who were reputed to be bright and competent for appointment to the highest court. On one such occasion when he went to Bangalore (in 1987), he made it a point to speak with members of the Bar and of the high court bench. He then came back with the name of M. N. Venkatachaliah (then only third in seniority in the High Court of Karnataka). Venkatachailah was promptly appointed to the Supreme Court, and he made good, although he had a short tenure of only 20 months as CJI. Venkatachaliah became one of our finest and most-respected chief justices in recent times. Alas, this care and concern in the appointment of judges is seen to be lacking nowadays.

All this will tell you why I have been so greatly disappointed after winning the *Second Judges Case*. Today, I can only express my extreme anguish at the current state of ground realities in the matter of appointment of judges.

The Supreme Court of India, where I have continuously practised for over 37 years (since May 1972), has lost much (very much) of its former prestige, not because cases are not decided fairly or to the satisfaction of the litigating public, far from it – its decisions by and large have been good and are respected. And we can hold our heads high and say so. But the extra-curricular task (imposed upon five seniormost judges by a judgment of the court itself), that of recommending appointments to the highest court, has not been conducted with the care and caution that it deserves. There is too much ad hocism, and no consistent and transparent process of selection. As a result, the image of the court has gravely suffered.

Notes and References

1. 1993 (4) SCC 441; AIR 1994 SC 268

2. Govind Vallabh Pant said so when replying to the debate in the Rajya Sabha on the 14th Report of the Law Commission.

3. *S. P. Gupta vs Union of India* – 1981 (Supp) SCC, page 87

4. The two exceptions were (i) the appointment in 1973 of A. N. Ray as CJI over his senior colleagues, Hegde J., Shelat J., and Grover J., who promptly resigned; and (ii) the appointment in 1977 of M. H. Beg (No. 3 in seniority) as CJI over Justice H. R. Khanna (No. 2 in seniority); he too promptly resigned. They were the two great (or infamous) supersessions in our judicial history.

5. *Supreme Court Advocates-on-record Association & Others vs Union of India* – 1993(4) SCC 441

6. He succeeded Justice Ahmadi in March 1997 as CJI.

7. Rubaiyat of Omar Khayyam by Edward Fitzgerald, Kessinger Publishing, LLC, Whitefish, Montana

8. 'Essays in Criticism'

9. It was with immense pleasure that I read in the front page of the *Times of India* (25 December 2009) the following news item supplied by the *Times* legal correspondent, Dhananjay Mahapatra:

Prez pushes for woman judge in SC – New Delhi: The Supreme Court has a sanctioned strength of 30 judges, but not even one woman judge at present. However, that could change soon, with President Pratibha Patil arguing in favour of appointment of a woman judge to the apex Court.

Patil recently made a noting in the file for the Collegium headed by Chief Justice of India, K. G. Balakrishnan, suggesting that it was time a woman judge was appointed to the SC …

10. Article 143 – Power of President to Consult Supreme Court:

(1) If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.

11. Special Reference No. 1 of 1998 – 1998 (7) SCC 739

Chapter 17

In Parliament – And Out of It

I greatly enjoyed my sojourn in the Rajya Sabha for the full, six-year term. During the first two years, I continued to spend more time on my law practice in the Supreme Court, and was not able to contribute much to the deliberations in the Upper House. But then in the third year, I realized that one could not do two jobs well viz. pursue one's law practice and at the same time be an effective member of Parliament. So I decided that law practice must give way.

*H*aving nearly reached the biblical lifespan of threescore years and ten, most of them in private practice, I did not anticipate any new *turning points in my life*. I was, however, surprised when in early November 1999, a couple of months before my seventieth birthday – my wife and I were in London – I received a call from the home minister in the NDA government, L. K. Advani. He said that he was taking a couple of names to President K. R. Narayanan for his approval for nomination to the Rajya Sabha.[1] One of them was mine. Whenever anyone suddenly springs anything on me (my wife always says), my first reaction is a negative one. True to form, I said 'no' to Advani, adding that I would be back in India the following week and would give him my firm answer. But Advani was adamant, 'I am going to the President just now and I want your answer now.' Meanwhile, my wife Bapsi, overhearing this conversation and my initial reaction, screamed at me and said, 'Say yes, say yes!' The reason for her screaming was that I had disappointed her on two previous occasions – first when I had declined in July 1996 the invitation of Deve Gowda, the day after he was sworn in as prime minister, to accept the office of attorney general of India;[2] and later in March 1998, a few days after Atal Bihari Vajpayee had been sworn in as prime minister to head the BJP-led government, when Justice H. R. Khanna (who had long since demitted office as judge of the Supreme Court) came to our home one evening saying that he had a message from Prime Minister Vajpayee, offering me the post of attorney general of India. Justice Khanna also said that if I declined, he was instructed by the prime minister to ask Soli Sorabjee and then K. K. Venugopal (in that order) to take up the office. I expressed my regret to Justice Khanna. Apart from not wanting to be part of a BJP-led government, the trauma of resigning in protest as a law officer for a second time dissuaded me from saying 'yes' to Justice Khanna. It was

this accumulated sense of disappointment that led to Bapsi screaming at me when Advani called. It was at her instance that I did say 'Yes' (call me henpecked if you like), and I have lived not to regret it. My appointment as nominated member[3] was announced whilst I was in England, and when I came back to India a week later, I was duly sworn in as a member of the Upper House.

Fali and Bapsi Nariman on an Alaskan Cruise – MV *Horizon*

I greatly enjoyed my sojourn in the Rajya Sabha for the full, six-year term. During the first two years, I continued to spend more time on my law practice in the Supreme Court, and was not able to contribute much to the deliberations in the Upper House. But then in the third year, I realized that one could not do two jobs well viz. pursue one's law practice and at the same time be an effective member of Parliament. So I decided that law practice must give way.

Since then I became a fixture in the House – always in my seat at 11 a.m. during the sessions. I not only attended all sittings of the House but fully participated in the deliberations – and also in various committees of Parliament. For my regularity and attention, the chairman (the vice-president of India) appointed me – when my six-year term was nearly over – as vice-chairman. And, in the absence of the chairman and deputy chairman, I even got an opportunity to sit in the chairman's chair and conduct some of the proceedings of the House!

During my term as member, noisy walkouts were fewer than they were later, and the House 'worked' for about 100 days in a year. I am quite proud of some of the speeches I made in the House in support or in opposition of bills and resolutions.

One of the first important interventions of mine was on the Gujarat riots (not riots, carnage).This is what I said:

> It is now sixty-five days since the carnage commenced and though it is hurtful to say so, the continual and senseless killings have only served as grist to the mill of political parties. Unless we get news from Gujarat of a killing every day, as unfortunately we still do, it appears that the rhetoric will not subside. I would say to all politicians: Give it up. Let us all give up all hate and acrimony. Recalling Godse or Hitler may make headlines, but it only fosters greater hatred, more acrimony, and the social divide becomes wider.
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> Let us remember instead the wise words of Nanaji Deshmukh (M. P.). He made a most inspiring suggestion during his brief intervention last week in the (Rajya Sabha) debate. His was the greatest single contribution to the way forward. He implored the Prime Minister Mr Vajpayee (who was present at that time) to go together with Mrs Sonia Gandhi to Gujarat – only then (he said) would people bury their differences – 'only then will peace be restored'. And why? Simply because as the Bhagavad Gita says: 'Whatever great men do the people do likewise, whatever standard they set up the people will follow.'
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> Besides, Nanaji was harkening to what Gandhiji himself did when he turned his back on partition in 1947 and went instead with Suhrawardy, the die-hard Muslim leaguer, to Calcutta and Noakali – relieving pain and anguish in those cities and saving thousands of lives.
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> We who are not in government (nor in the Opposition) *do* have a right to ask those in governance – 'What have you done to relieve this pain and anguish in Gujarat?'
>
> There is something the home minister (L. K. Advani) can *do*, if he has the will. On April 24th when answering a question about Gujarat and giving some statistics, the home minister said in response to my query that the Gujarat government having already appointed a commission of inquiry with a retired high court judge, the central

government could not appoint a commission of inquiry with wide ranging powers presided over by a Supreme Court judge, which was the specific recommendation of a constitutional body, the Minorities Commission.

The hon'ble minister must know that the question of setting up a commission of inquiry with a sitting Supreme Court judge with wide ranging powers of investigation and additional powers of awarding relief would go a long, long way towards restoring confidence in the minority community. This is not a federal question, much less a legal question. It is a matter capable of easy resolution. It does not require consultation with constitutional lawyers. It requires the will, and a practical approach. The practical approach is for the home minister to pick up the telephone and tell the chief minister that the central government wishes to respect the views of the Minorities Commission and request him to withdraw his prior notification appointing the K. G. Shah Commission, which from all accounts has not even started functioning, and then promptly issue the notification of the central government as recommended by the Minorities Commission. It is unlikely that Mr Modi will not honour the wishes of the home minister at the centre.

Like individuals in positions of influence, a government in a position of power, cannot always be right. It is the arrogance that accompanies power that leads them to think so.

With all the audio-visual, oral and documentary evidence compiled in reports of official commissions and of groups of NGOs, it is time that the government of the day realized that in its assessment of the situation in Gujarat it may be mistaken.

During the debate on the Salary & Allowances and Pension of Member of Parliament Bill, 2003, I had said (on 23 December 2003):

Madam Deputy Chairman, in this happy mood of the House, I am sorry to strike a slight note of caution. Whenever we provide more perks and facilities for the members of Parliament, we are always criticised. Often, I believe, and rightly, our performance is assessed at the bar of public opinion and at the bar of public opinion our performance in Parliament, as members of Parliament, sometimes,

> leaves much to be desired. So, I respectfully suggest that we should honestly face it. At times like this, we should, I believe, be critical of ourselves. Why do we not provide, for instance, if necessary by a resolution, as unanimously as we are going to pass this Bill, that, if for any reason, the proceedings of the House, on any day, are not held, the members are not entitled to their daily wage? No work, no pay. The Bhagavad Gita says, 'Whatever the important people do, others follow.' Why can't we set an example? The people, I believe, expect us to do that. If we show we are responsive to genuine public opinion, I am sure public opinion will not grudge our perks, pay and privileges. We must, I suggest, by example not by preachings, show to the people that parliamentary democracy is the best form of government, and, as a start, I humbly believe, we should adopt rules implementing the three reports of the Ethics Committee which have already been unanimously adopted by this House. Thank you.

But to no avail. The bill was passed by voice vote and soon became law. Our salaries, perks and allowances stood increased.

The Central Vigilance Commission Act, 2003, came up for consideration as a bill before the Rajya Sabha in August 2003 after being passed by the Lok Sabha. It was meant to stem the rot of corruption in public life by high government officials. The act set up a three-member Central Vigilance Commission (CVC), with guaranteed tenure, appointed on the recommendation of a high-level committee so that it could function independently of the central government. Hidden in the verbiage of that act, however, is a provision tucked away in a third sub-clause of the twenty-sixth section dealing with what is commonly known as the 'single directive'.

Under the provisions of this act, any whisper or suspicion of corruption in employees of the central government at the level below that of joint secretary can be inquired into and investigated by the Central Bureau of Investigation over whom the statutorily appointed CVC is to exercise a hawk-like superintendence. But all employees of the central government at the level of joint secretary and above are immune from any inquiry or investigation into any offence alleged to have been committed by them 'except with the previous approval of the Central Government'.[4] The only rationale offered by the government for this differentiation (on the floor of

the House when the bill was debated) was that it was essential to protect officers at 'decision-making levels' and to relieve them of the anxiety and likelihood of harassment from making honest decisions.[5] This was perhaps an understandable reason. But when I suggested in the House to the minister who moved the bill to substitute for the words 'except with the previous approval of the Central Government', the words 'except with the previous approval of the Central Vigilance Commission', his refusal to do so was totally inexplicable to me.

If we can trust the independently appointed Central Vigilance Commission not to needlessly harass a director of a department or an undersecretary of government with threats of prosecution under the Prevention of Corruption Act, why can we not trust the same commission in respect of the conduct of a secretary, additional secretary or joint secretary? In fact, why otherwise have a Central Vigilance Commission at all? Is vigilance only for the small fish? Besides, as everyone conversant with the working of government departments knows, decisions are recommended tentatively on the file at all levels in the hierarchy of officialdom. In our parliamentary system of democracy, the ultimate decision is taken only by the minister. Only the minister is answerable to Parliament, not the secretary, the additional secretary or the joint secretary. Therefore, in matters of so-called 'decision-making', treating equals unequally is not only discriminatory but also violative of the equality clause of the Constitution.[6] I said all this in the debate on the bill.

During the debate on the Central Vigilance Commission Bill in the Rajya Sabha, my friend Dr P. C. Alexander also spoke in some anguish:

> When I entered the civil service way back in 1948, at the beginning of our Independence, my worry was whether my tehsildaar would be corrupt, my sub-inspector would be corrupt, my bench clerk in my court would be corrupt. I could never imagine that my senior officers would be corrupt. I could never imagine when I became a senior officer that I would ever become corrupt. [Under this Bill], [we] have given senior officers protection. Government sanction is needed before even an inquiry can be started against them.[7]

Dr Alexander termed this clause as the 'Enemy Number One of the Bill'.[8] And former Central Vigilance Commissioner, N. Vittal, had already

gone on record to say that the provision was 'vicious'. What is most disturbing to me, however, is the polity in which we live. What is of regret to me is not that the government pushed through the Central Vigilance Commission Bill, 2003 (most of whose other provisions were unexceptionable), nor that the minister did not accept my proposed amendment to the single directive clause. What hurts me more is that the opposition in the Rajya Sabha (now in government) was, in August 2003, in an effective position to ensure that the obnoxious *single directive* was not passed, but the opposition also approved the bill in its entirety! With adult franchise we not only get the government we deserve, we also appear to get the justice we deserve!

I am particularly proud of another bill. It was *my* bill – Private Members' Bill No.: XXXIX of 2004 – drafted and introduced by me in the Rajya Sabha on 3 December 2004. It was called 'The Disruption of Proceedings of Parliament (Disentitlement of Allowances) Bill, 2004', and was introduced to disentitle members of Parliament from drawing allowances during the days on which proceedings of Parliament were adjourned 'due to disruptions caused by members of Parliament individually or collectively', whatever be the reason. The main clauses were clauses 3 and 4 which read as follows:

> 3. Where the proceedings of either House of Parliament are disrupted by Members of Parliament either individually or collectively and the House has to be adjourned with or without transacting any business for the substantial part of the day, and the Speaker or the Chairman (as the case may be) certifies to that effect, then notwithstanding anything contained in section 3 of the Salary, Allowances and Pension of Members of Parliament Act, 1954, no member shall be entitled to any allowance for the day so adjourned even if he has, on that day, signed the register referred to in the proviso to that section, and such adjournment shall not be taken into account for the purpose of calculating the period of residence on duty during that session.
>
> 4. At the end of every session of Parliament, the Speaker or the Chairman (as the case may be) shall certify the dates on which either

House had to be adjourned due to disruption caused by Members of Parliament either individually or collectively.

The 'Statement of Objects and Reasons' of this Bill (which is required to be appended to every bill introduced in the House whether by ministers or private members, whose names had to be indicated at the end) read as follows:

The office of Member of Parliament is a prestigious office and one of trust. Members of Parliament are representatives of the people and are responsible to them. Their attendance and participation in the proceedings of the House is a public duty. Accordingly, they must at all times be conscious of their responsibilities and endeavour to maintain the public trust reposed in them by performing their duties not only with honesty and integrity, but also with regularity; they must respect the Constitution and the conventions evolved there under, the rules of procedure and the conduct of business of Parliament and abide by the rulings of the presiding officers in each House.

Parliamentary democracy is based on the assumption that the Executive is accountable to Parliament and that Members of Parliament will exercise vigilant control over the actions of the executive and hold the executive accountable for its actions. This is the essence of good governance. Members of Parliament are expected to take keen interest in attending the sittings of Parliament with regularity and also to take active part in the deliberations of the Parliament. Literally, crores of rupees are spent in convening and holding Sessions of Parliament each year. If the proceedings of the either House is disrupted and the House is not permitted to function and transact the notified business of the day, adjournments become inevitable and vast amounts of public money are needlessly thrown away. Besides, actions of all branches of the Executive also escape vigilant legislative scrutiny due to valuable Parliamentary time being lost and wasted in adjournments. In order to arrest this tendency and to restore the credibility and prestige of each of the Houses of Parliament, it is proposed to disentitle sitting Members of Parliament from receiving any allowance during those days when Parliament has been adjourned due to disruptions caused by Members of Parliament either

individually or collectively.

The Bill seeks to achieve the above object.

Everyone congratulated me on the introduction of this Bill – including MPs. But there was no one to 'bell the cat'. My favourite private member's bill lapsed, when I ceased to be a member of the House after my six-year term! And the bill went into oblivion!

On 20 April 2005, Dr Karan Singh, chairman of the Ethics Committee, moved the following motion:

> That the Fourth Report of the Committee on Ethics presented to the Rajya Sabha on 14th March, 2005, be taken into consideration. Also to move: 'This House agrees with the recommendations contained in the Fourth Report of the Committee on Ethics presented to the Rajya Sabha on the 14th March, 2005.'

I spoke in support of the motion (20 April 2005):

> I, along with the Chairman of our Committee commend the Report for acceptance of this House. The Report laid on the table is about transparency and accountability. Two weeks ago Sir, the Vice-President of India was to declare open a National Convention on 'Transparency and Accountability of Public Governance'. But he could not deliver his address since he was called away on a state visit to Rome. In the printed speech which was circulated he mentioned, 'A lot has been said on the subject of transparency and accountability for so many years,' and he quoted Andre Gide, the French Philosopher who said: 'Everything has been said already, but as no one listens, we must always begin again.' The Vice-President who is our Chairman is absolutely right. The importance of speaking on the same subject even when 'no one listens' (i.e., no one of any consequence listens) is sometimes good because it might click. In a dictionary of the English Language – not the *Oxford* or the *Cambridge* dictionary – but what is known as the *Doubter's Dictionary* – ethics is defined as 'a matter of daily practical concern described glowingly by those who intend to ignore it'. But, Sir, we cannot afford to ignore ethics at all, not in this chamber. And the basic point about ethics is that it fixes a sense of

responsibility, something external to ourselves. Sitting here, privileged as we are, we need to convince those in the outside world that all that we say and do is motivated by objective criteria, not by any sense of personal motivation. That is why as Dr Karan Singh said, the register of interests, a code of conduct and sanctions for the breach. But, Sir, I would like to draw particular attention to one of the recommendations of our committee which is in para 4.7. While expressing deep concern over frequent disruptions of the Rajya Sabha, we unanimously expressed the view that it is important in a parliamentary democracy to understand and appreciate one another's point of view and be tolerant of dissent. I must confess, Sir, that I was very sad yesterday – the day our Report was tabled. The parliamentary delegation from Jordan was witnessing the proceedings in this House and the Deputy Chairman in his very fine welcome speech expressed the hope that they would learn something of our parliamentary system. They were here for ten minutes and the only thing they heard and learnt from our parliamentary system was that there were continuous disruptions and no one could hear what anyone else was saying. That is a very poor exhibition of our parliamentary democracy to the world. And I, Sir, personally feel very ashamed of it.

It does not matter who is to blame and who is not to blame. I think, the leaders of both the sides should have anticipated this visit, suspended their protests and counter-protests and gone on with the business of the House, at least, whilst the delegation was in our midst.

Coming as they do from a very nascent parliamentary democracy, the members of the parliamentary delegation from Jordan, who don't often visit India, must have thought that this is certainly not the form of government that they would like to choose. Therefore, I do appeal to the hon. members that the image of this House is as important as the proceedings that take place in this House.

With these words, I commend the report for acceptance. Thank you.

All of us – members of Parliament – were very pleased with ourselves when we passed The Prevention of Money-Laundering Bill, 2002, to prevent money laundering and to provide for confiscation of property derived from or involved in money laundering, and for matters connected therewith or incidental thereto. The bill introduced by the government had

become necessary to implement the political declaration adopted by the special session of the United Nations General Assembly (held from 8 to 10 June 1999) which called upon the member states to adopt national money-laundering legislation and programme. But after the bill was passed into law and received the president's assent, it was (unknown to MPs) never brought into force, till a new bill, innocuously called the 'Prevention of Money-Laundering Amendment Bill, 2005', was introduced when the finance minister first told the House that the '2002 Act' had not been brought into force!

A bill in Parliament, when passed by both Houses and receives presidential assent, becomes enacted law but it is not law-in-force until the government notifies the date on which the act is to come into force, unless Parliament has declared that it shall come into force at once. When the Prevention of Money-Laudering Amendment Bill, 2005, was introduced and it was revealed to MPs for the first time that the '2002 Act', which had been already passed, had not been brought into force, my comment in the Rajya Sabha (as recorded in the proceedings of 11 May 2005) was as follows:

> Mr Deputy Chairman, Sir, years ago when I was in college, we had a book in politics called *How India Is Governed* by Mr Appadurai. And I am reflecting today on how poorly India is governed. My chagrin is due to this, and I share Mr Jairam Ramesh's concern that I happened to be present, Sir, when this Bill was passed into an Act in 2002. And the enormity of the problems of not bringing this Act into force is quite obvious. I only rise to speak and mention one fact to the hon'ble Members. I don't know whether all of them know, that a Bill which is passed by this House and ultimately becomes an Act after being passed by the Lok Sabha, if it is not brought into force, it cannot be enforced, and no one, not even the Supreme Court can compel the Government to bring it into force. That is the decision of the Supreme Court. So, the Government may choose to bring in a law, we all debate it, we all become very happy that it has been passed, but if it is not implemented and not brought into force, nothing at all can be done about it. Just see the enormity of the problems that has arisen, Sir. If you see the offence of money-laundering, it is apparent that, it was not brought into force only because of the enormous expenses that would be incurred by

setting up a new machinery for bringing it into force. But, see, what all has happened in the meanwhile. The proceeds of crime are sought to be tackled with this Bill. One of the proceeds of the crime, and the source of the proceeds of crime is from offences established under the Prevention of Corruption Act. It is as simple as that. How many millions of rupees have been passed from 2002 to now, and how many people have been convicted or in the course of being convicted under the Prevention of Corruption Act? Crores of money has been found. You will not be able to trace this money, you will not be able to confiscate anything because this Act was simply not brought into force. Sir, I have a suggestion for the hon'ble Finance Minister, it is also a suggestion to other hon'ble Ministers and to all of us who take part in the debates on these Bills that one important thing to do the moment an Act is passed and has received the Presidential assent is to, at least, bring into force section 1(1) of the Act, because, then there is no retrospective operation of the Act. When the rest of the provisions are brought into force the Act comes into force on the day when it is said that it comes into force even if the other provisions don't come into force. Therefore, the Act is in force. Now, take the case of investigation. You are setting up a Directorate and so on. Will your Directorate be able to go into past transactions? Obviously not. They are all scot-free. Only for the future, you get into it, if the Principal Act is not brought into force.

We didn't know that this Act that we solemnly passed in this House in 2002 after great debate was such an important thing. This was done pursuant to a UN Resolution, which had sanctions behind it, saying, 'if you do not pass the Money-Laundering legislation' – if you remember, it was a part of terrorist and crime business – 'it would be taken with extraordinary seriousness'. But this is how successive Governments have treated it. They have not treated it seriously at all. This is a very, very great problem, Sir, which I find. All Governments, including the present and the past, move even slower than glaciers in the Himalayas. Therefore, Sir, this is a very, very serious matter, and I would require some explanation from the hon'ble Minister and also from various other Groups of Ministers.

We keep passing Bills. We are so happy to pass Bills. Tomorrow we will pass something else. The day after tomorrow we would pass

something else. But since it is not brought into force, strictly speaking, it cannot be implemented. And, if it cannot be implemented, certainly criminal sanctions cannot be taken. We have all this great paraphernalia of criminal sanctions. Special courts have been set up under the principal Act. There is no court functioning from 2002 under this Act. What is happening in the meanwhile to the money laundering? Money laundering is going scot-free. Let us face it. This is the tragedy of legislation in this country. This is the problem and someone must look into it.

I would earnestly request the Hon'ble Finance Minister, who has very candidly and frankly told us that since 2002 this Act has not been brought into force. That was probably because the infrastructure was not there, although it was required to be there. So, it was just on paper. It is just a meaningless law. There is no law at all. It is there just in order to conform to some UN Resolution, whereas, as Mr Jairam Ramesh rightly pointed out, we have crores of rupees in money laundering going on. No one knows what it is all about; there is no intelligence about it. Therefore, I am glad, at least, the Minister has applied his mind to this legislation and has taken it in hand and made some amendments. But, when are we going to have the special courts? When are we going to have the tribunals? When are people going to be hauled up for the proceeds of crime? Proceeds of crime are being used for offences established under the Prevention of Corruption Act, which we all know about. I am not talking of Arms Act and all those other aspects, which are there.

Therefore, Sir, I would like to make an earnest request to the Hon'ble Finance Minister. Of course, this is a perfectly innocuous Bill and we would, of course, pass it unanimously. But it raises a very, very serious problem in the passing of these measures. We get from the Lok Sabha a Bill; immediately, the next day, we pass it. We all think that it is a great law that we have passed. But it is nothing. The President gives his assent, thinking that everything would be done, but nothing is done. No one can enforce this. No one can compel any Government in this country to bring a law into force. In fact, I do not know if hon'ble Members know that Article 22 of the Constitution, which provides for an advisory board for preventive detention to consist of sitting judges,

was enacted (way back) in the year 1978. It has still not been brought into force. Nothing has happened about that.

I had also drafted and introduced in the House several other bills – as private members' bills. They were:

(a) The Judicial Statistics Bill, 2004, to provide for the collection and publication of judicial statistics which our judges were reluctant to reveal. I was of the view that collecting empirical data would help legal scholars and that setting up a legal database and publishing an Annual Judicial Statistics Report (already in vogue in many countries like the United Kingdom and United States of America) would help the media and general public to assess the performance of judicial institutions and keep them accountable. It would also go a long way in demystifying the law and the administration of justice.

(b) The Constitution (One Hundred and Third Amendment) Bill, 2004, to amend the Constitution to provide for the raising of the retirement age of judges of high courts from 62 to 65 years, as recommended first by the Law Commission of India in its fourteenth report on judicial reforms and also next recommended by the National Commission for Reviewing the Working of the Constitution (the Justice Venkatchaliah Commission). There had been (there still is) a tendency on the part of some high court judges to curry favour with judges of the Supreme Court (including the chief justice of India) in order to seek elevation as quickly as possible to the highest court so as to ensure a longer judicial tenure (65 years). The private member's bill (if its provisions had been accepted by government) would have put an end to 'cronyism' which has adversely effected the functioning of the high courts.

(c) The Representation of the People (Amendment) Bill, 2004, was to ensure avoidance of persons with criminal antecedents from entering Parliament and state legislatures. To prevent persons charged in a court of law (after investigation) of heinous criminal offences from exploring the delays in the judicial

> process, I proposed to make the framing of charges (after investigation) by a competent court as a ground of disqualification for standing for election to Parliament and state legislatures (under the existing law, disqualification attaches only on conviction for major offences). The bill was in keeping with the recommendations made by the Law Commission in its 170th report on reform of electoral laws, as well as is keeping with the recommendation of the Justice Venkatchaliah Commission (2002). This was also the view of the Election Commission – but no government at the centre was bold enough to act on their recommendations.

Private members' bills are introduced only on Friday afternoons – since the business of the House from Monday to Thursday and the first half of Friday is official business. Friday afternoons are for private members' bills and private members' resolutions. Many members had orally supported my bills – including the Disruption of Proceedings in Parliament Bill, 2004 – but then, since my term came to an end in November 2005, whilst all these bills were still pending consideration, they lapsed upon my retirement from the House. A pity, but so be it.

* * *

I have written earlier that the happiest years of my professional life were in the chambers of Sir Jamshedji Kanga. Well, next to those years were my six years (1999–2005) in Parliament. I enjoyed the confidence of all members on all sides of the House and they always listened to me, though they did not always accept what I said.

I remember one instance when there were excessive floods in Mumbai due to incessant rains in the monsoons of 2005, and civic amenities totally failed. People were stranded in their cars for as much as 24 hours. Tempers ran high in the House (including mine). And I had the temerity to stand up and say that it was time that Mumbai was made a union territory! What a storm of protest broke loose! Not only the Maharashtrian lobby in the Congress and in the BJP, but all members were vociferous in denouncing my suggestion (all, except the deputy chairman who was presiding). I quote the following extract from the official proceedings:

SHRI FALI S. NARIMAN (NOMINATED): Sir, I entirely agree with what was just said. I have two suggestions, concrete suggestions, for the Minister because we are only at the stage of suggestions. My suggestion is, please leave the people of Mumbai alone. Take politics out of Mumbai. If you take politics out of Mumbai and leave it as a commercial capital of India, which it is, leaving aside the political capital, which is Delhi, I think we will have much to gain even by this terrible tragedy. The way to do it is a Constitutional way. You please make it a Union Territory. You make Mumbai a Union Territory. (Interruptions)

SHRI PRAMOD MAHAJAN: Sir, I totally and completely oppose this suggestion and any effort to take away Mumbai from Maharashtra will not be tolerated. (Interruptions)

SHRI FALI S. NARIMAN: If it is not possible or tolerated, then administer it. (Interruptions)

SHRI FALI S. NARIMAN: I am sorry. Just listen. My suggestion to the Minister is this. Take the example of Jamshedpur. Jamshedpur was an old zamindari which has been abolished. It is now leased. Jamshedpur in the State of Bihar is, perhaps, one of the best administered areas in the country and it so remains. You evolve a solution, Mr Mahajan, as to how best you can administer Mumbai. I would respectfully suggest that there has to be some depoliticisation of Mumbai. People are fed up with your Ministers – your Ministers and these Ministers of Mumbai. They all go in cars – they have five cars each – with great flags and in a great flurry. Who went in boats or anything else to support them? Who went? (Interruptions)

SHRI JANARDHANA POOJARY: Sir, we do not agree with this suggestion. Nobody agrees with this suggestion. (Interruptions)

DEPUTY CHAIRMAN: Don't agree. Who is asking you to agree with this suggestion? (Interruptions) … Mr Poojary … (Interruptions)

SHRI C. RAMACHANDRAIAH: This suggestion may not be acceptable to us. But let him express his view. (Interruptions)

DEPUTY CHAIRMAN: The hon. Member has right to make a suggestion. But you may not like it. (Interruptions)

SHRI FALI S. NARIMAN: You may not like it. (Interruptions)

SHRI JANARDHANA POOJARY: I am sorry to say that we do not agree with this suggestion. There should not be any controversy about it. (Interruptions) I am sorry to say this, Mr Nariman. (Interruptions)

SHRI FALI S. NARIMAN: Sir, I respectfully suggest for your consideration that please consider how best your Ministers can also contribute – whichever Government is there – to maintaining and letting Mumbai remain the Financial Capital of India which it is. Thank you.

(Ends)

SHRI C. RAMACHANDRAIAH: This is bad tendency. Sir, hon. Members have got the right to express their opinions. We may not accept it. But their right should not be suppressed here. It should not be allowed. (Interruptions)

DEPUTY CHAIRMAN: This is the forum where you can express your views. (Interruptions)

SHRI JANARDHANA POOJARY: Sir, we do not agree with his suggestion. (Interruptions)

My days as a parliamentarian, I can quite frankly say, have been a rich experience – and I have learnt a lot. People often used to ask me how I fared as a member, 'How could an intellectual like you fit in with a host of others?' I always responded to this impertinent, unfair comment with the reply that the Rajya Sabha was a microcosm of the nation and representatives from various sections of society mingled together, spoke about problems that concerned them and were generally tolerant of one another, though this spirit of tolerance was not necessarily reflected in the rest of the country.

It was with much sadness then that I demitted my office when my six-year term came to an end. It ended, not with a bang but a whimper! I had been nominated to the House (by the president of India) on 22 November 1999 during the session commencing in October 1999 (i.e., mid-session). The monsoon session of 2005 had ended in October 2005. Since the next session of the House was only in December 2005 (and since in between I retired on 21 November 2005), the customary farewell speech remained unspoken!

I consoled myself with the reflection of an old friend and colleague, G. Ramaswami (or GR, who is alas no more). When GR ceased to be attorney general of India in November 1992, he said that when the government took away from him the title of attorney general of India (and conferred it on another) this was one of the occupational hazards of holding high constitutional office. 'But,' he went on in his inimitable manner, 'no one – Fali – no one can ever take away from me at any time the title of ex-attorney general of India! He-he.'

* * *

Here I digress a bit on something of considerable importance in Indian public life – the VIP Syndrome. 'VIP' – it was the British who coined it but, initially, it had no snob value. During the Second World War, it was used to describe the movement of planeloads of important persons to avoid disclosing their identity. Sixty years later, we continue to use the

abbreviation as a status symbol, as if to emphasize that although under our Constitution all persons are equal, some are more equal than others.

Next only to population, the major problem about governance in our country is the enormous divide between the governed and those who govern. We have inherited this from over 200 years of Mughal rule, followed by more than a century of British rule. We have now reached the stage where those who govern, appear (to many of us) to belong to another race.

When I was in college in British India way back in the 1940s, it used to be jokingly suggested that the British Empire began with the building of country clubs – because once you build a country club what is the point of it unless you keep somebody out? The great divide – the wall of separation – started with the British Country Club. The British could afford to operate in this fashion, because they ruled (and made no pretence about it): they did not govern, and so had few problems of governance. But they had one great quality – they instilled in the officials who ruled, a high sense of idealism in government service. It went a long away. It was impressed upon every public official that howsoever important his position, he remained (first and last) a public servant – in the service of the people.

When the British left, we kept the wall of separation, but discarded the idealism which inspired generations of public officials in British India. And over the years, officialdom has become more anti-people and more secretive. The Official Secrets Act, which was originally enacted by the British to protect secrets, is now continued in independent India to protect officials.

'VIP' fosters a feeling of alienation amongst the rest of the people. Aleksandra Solzhenitsyn, the great Russian critic of the communist system of government, once said that 'a man used to moving about the streets riding in a motor-car can never understand a pedestrian – not even at a symposium'! The VIP, protected by a posse of security guards, cannot understand, and soon loses touch with the people who put him there.

I suggest we should learn from what happens in other places.

In May 2004, Bapsi and I were invited by a small group of Parsis in South Asia to inaugurate a museum of Zoroastrian artefacts in Singapore. The chief guest was the minister of culture of that city state. The organizers suggested that we should move to the porch to receive him as he rolled up in his limousine. We stood waiting, and I was expecting police sirens to

announce the impending arrival of the dignitary. But to my dismay, the minister made his appearance quite unobtrusively – from a side door after having parked his car in the parking lot below the museum building! He later told me that ministers in Singapore, though handsomely paid by the state, are not provided either with a car or a chauffeur. They drive their own vehicles without much help from the local police force. Of course, I told him nothing about how the police bandobast operates in the still imperial city of Delhi, whenever our 'servants-of-the-people' move around from place to place! My humble plea to those in power is, 'Shed the VIP Syndrome – before the iron gets into your soul.'

* * *

After I demitted office and became Fali S. Nariman, ex-MP, I resumed my legal practice but with less intensity. I was well known in circles where international commercial arbitration was practised. I have been fortunate to be engaged in a few international commercial arbitrations – an exhilarating experience since one is pitted as chairman of a tribunal (or as a member) with persons from different backgrounds – persons who are reared in different legal systems. It is only in international commercial arbitrations (not in courts) that the civil law system and the common law system coalesce to produce a resolution of commercial disputes, as to how satisfactory a resolution, only the users of arbitration can tell!

* * *

In my long professional career, I have been occasionally summoned by the president of India for advice – on several occasions by President R. Venkataraman (who was head of state from 1987 to 1992) and later by his successor, President K. R. Narayanan (head of state from 1997 to 2002); also, on one occasion, by President A. P. J. Abdul Kalam (head of state from 2002 to 2007). K. R. Narayanan and his charming wife Usha had become our close friends – Usha was Burmese and would often greet me in that language. I would return the greeting but then lapse into English. Having studied Burmese only in school, I remember one complete sentence: '*Thamin sa pee bee la?*' (Have you finished your dinner?) This has to be

spoken in typical sing-song fashion with an emphasis on the interrogative '*la*'! But asking a person whether she has finished her dinner is not exactly an ideal conversational piece!

Fali Nariman greeting President K. R. Narayanan and his wife, Usha Narayanan

K. R. Narayanan was not only a very gracious head of state but always held his own. During his presidentship, when I. K. Gujral was the prime minister, the counsel of ministers was sent on to the president, for promulgation, a proclamation under Article 356 of the Constitution for the introduction of President's Rule in the State of Bihar. Acting under the proviso to Article 74(1)[9] of the Constitution, the president returned the proclamation for reconsideration by the Council of Ministers – giving (as he always did) elaborate reasons for his decision. This became widely known, and the Union Government under Prime Minister Gujral wisely refrained from reaffirming the proclamation and sending it back to the president. If it had, the public, 'We the People' would have been against it. In politics, discretion is often the better part of valour.

I have always believed that the president provides the window (perhaps the only window or opening) in that wall of separation which divides those in governance from rest of the populace. Even after the Constitutional Amendment obliging him to act in accordance with the reconsidered advice given by his Council of Ministers, there is no prescription as to the time when he should so act. Time runs in the president's favour, and the astute seventh president of India, Giani Zail Singh (1982–1987) used this to great

advantage. When the Post Office Bill, 1987, was submitted to him for his assent, there was much public criticism of its provisions, particularly of the one which permitted an interception of all communications through the mail by the government of the day. Although the bill was passed by both Houses of Parliament, Gianiji paused. He could sense the public outrage, and responded to it by not giving his assent. Before demitting office, he wrote on the files that he hoped that his successor would not clear the bill![10] As a consequence, the public outcry against the bill gathered greater momentum, and the bill lay unsigned even on his successor, President Venkataraman's desk; the latter having expressed his own displeasure at the bill, returned it to the prime minister of the day (V. P. Singh) in January 1990. The bill was then tabled again in the Rajya Sabha: where it still remains, officially and only in name, a pending Bill – in actuality, a parliamentary relic![11]

All of which illustrates how a head of state can successfully 'choke-off' unpopular legislation by just doing nothing. Through a calculated process of deliberate inaction, an unpopular, regressive measure can be successfully prevented from becoming enacted law, i.e., by exploiting one of the deliberate silences in the Constitution as to when a bill passed by both Houses of Parliament should be given assent by the president. No one suggested that Gianiji had defied Parliament, no one moved for his impeachment: the obvious reason, of course, was that the president had the firm backing of 'We the people'.

The British Constitution is not written. But it recognizes that the British monarch, on rare but important occasions, is entitled to intervene in public affairs in a way that may be decisive. As the constitutional historian of England, Walter Bagehot, used to say, 'the greatest wisdom of a constitutional King would show itself in *well-considered inaction*'.[12] Gianiji might have been untutored about what went on in Westminster, but he had astute political horse sense: he could sense that people were behind him when he delayed (and then withheld) assent to the Post Office Bill. And in politics, nothing succeeds like success.

Notes and references

1. Under Article 80: Composition of the Council of States – (1) [The Council of States] shall consist of (a) twelve members to be

nominated by the President in accordance with the provisions of clause (3) … (3) The members to be nominated by the President under sub-clause (a) of clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely: literature, science, art and social service.

2. She and I had affection and regard for Deve Gowda, having come into frequent contact with him when he was chief minister of Karnataka and I was chief counsel for Karnataka in the Cauvery Inter-State Disputes Tribunal. We found him to be a caring person. For instance, when an honest IAS officer (Vasudevan) was sent to jail for six months for contempt of court – wrongly in my view – by a bench consisting of Justice K. Ramaswami and Justice Hansaria, Deve Gowda felt that he must help this officer of his state. He flew over to Delhi on three evenings in succession (from Bangalore) to consult with me as to whether the president could not exercise his power of pardon. Unfortunately, the secretary to the president was not convinced. He did not want the president to act against the judgment of the Supreme Court, and poor Vasudevan was made to undergo his six-month term of imprisonment, which was, in my considered view, a grave travesty of justice. It was pique, not justice, that sent Vasudevan to jail!

3. The status of a nominated member of Parliament is that he or she is a non-party member to whom the party whips of none of the political parties applied. A nominated member is, strictly speaking, an independent member with no party affiliations or leanings.

4. Section 26 (c) of the Central Vigilance Commission Act, 2003, amends the Delhi Special Police Establishment Act (under which the Central Bureau of Investigation has been set up) by adding Section 6A which reads as follows:

6A (1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been

committed under the Prevention of Corruption Act, 1988, except with the previous approval of the Central Government where such allegation is in relation to:

(a) the employees of the Central Government of the level of Joint Secretary and above …

5. Report of the Joint Committee of Parliament on the Central Vigilance Commission Bill, 1999, Lok Sabha Secretariat, New Delhi, 2000, para 41, p. XVI

6. This single directive was challenged before the Supreme Court as violating, inter alia, the dicta of the Supreme Court in *Vineet Narain*.

7. Debate on the Central Vigilance Commission Bill, 2003, in Rajya Sabha dated 7 August 2003

8. Ibid.

9. Provided that the president may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the president shall act in accordance with the advice tendered after such reconsideration.

10. *Memoirs of Giani Zail Singh: The Seventh President of India* (1997), Har-Anand Publications Pvt. Ltd., New Delhi, p. 279.

11. *Working a Democratic Constitution* (1999), Granville Austin, Oxford University Press, pp. 513–514

12. Rodney Brazier has suggested that the monarch (a Constitutional head of state) can legitimately, if extraordinarily, intervene in the legislative process; e.g., a government bill designed to achieve a permanent subversion of the democratic basis of the constitution could be vetoed. *Constitutional Practice* (1994), 2nd Edition, pp. 189–192.

Chapter 18

The Finishing Canter

My greatest regret in a long, happy, interesting life is the intolerance that has crept into our society. For centuries, Hinduism had been the most tolerant of all religions. ... The Hindu tradition of tolerance is under immense strain – the strain of religious tension fanned by fanaticism. This 'great orchestra of different languages' and 'praying to different Gods'– that we proudly call India – is now seen and heard playing out of tune.

*T*hings have moved on since 2005 with some ups and downs. I am reminded of a foreword written way back in September 1950 by Sir Jameshedji Kanga – a foreword to the first edition[1] of *Kanga & Palkhivala on Income Tax* published by N. M. Tripathi (1982). The book was really the work of Palkhivala alone. In the foreword, Kanga had written:

> The riders in a race do not stop short when they reach the goal. There is a little finishing canter before coming to a standstill. There is time to hear the kind voice of friends and to say to one's self, 'the work is done'. But just as one says that, the answer comes: The race is over, but the work never is done while the power to work remains. The canter that brings you to a standstill need not be only coming to rest. It cannot be, while you still live. For to live is to function. That is all there is in living.[2]

In my 'little finishing canter before coming to a standstill', I have been singularly fortunate. In January 2007, I was conferred by the president of India the Padma Vibhushan 'in recognition of exceptional and distinguished services in the field of Public Affairs'. I was quite pleased with the announcement. Perhaps (I thought to myself) this was the compensation for not being able to deliver my farewell speech in the House and hear the tributes of my good friends there! But witness my dismay when the day after the announcement of the Padma Awards, Vice-President B. S. Shekhawat (also chairman of the Rajya Sabha) – who was very kind to me during my sojourn as MP – came over to our home to convey his personal congratulations. At that time he said something very significant. He said in his fluent Hindi (he always – or at least generally – spoke in the national language, whether inside or outside the House, even though he was quite

proficient in English) that though I undoubtedly deserved the honour, 'but do consider how these honours are being given. I have come to tell you that my own doctor, as well as the President's doctor, [was] given a Republic Day award!' His suggestion was that the system of patronage should end, that there should be an independent body for selection of persons who had done public service to the country especially from small towns and small villages – it is they who should also be given recognition by the government rather than people in the public eye. I felt a bit chastened. So when I went to the investiture ceremony along with other stalwarts[3] to receive my medallion of honour, I recalled the words of Vice-President Shekhawat, and tried to look humble and undeserving!

President A. P. J. Abdul Kalam presenting the citation of
Padma Vibhushan to Fali Nariman (2007)

* * *

At this ripe old age (besides the family and staff) what sustains me are two things. First (and frankly), the possibility and the thrill (even now) of winning a difficult case ('The race is over, but the work is never done while the power to work remains!'). And second, the affection of all my

colleagues at the Bar (young and old) whose company I greatly value and enjoy, so much so that a couple of years after being allotted (by the chief justice of India) a small chamber in the building on the road opposite the Supreme Court (after I kept it for a few months), I surrendered it because I did not find it of use. I did not like sitting alone in my chamber waiting for my (fewer and fewer) cases to come up in court. At 80 plus, it is better to sit in court, and listen and learn (as Sir Jamshedji used to say) or sit in the lounge and talk to friends (old and new) at the Bar.

At this age, one does not – one should not – think of one's professional future. I recall the occasion when in Bombay, Jehangir Vakil, a senior advocate, once came to Sir Jamshedji's chamber just after Justice N. H. Coyajee had retired (on 24 November 1957) as judge of the High Court of Bombay. Jehangirji was a fixture in Coyajee's court, almost always appearing either for one side or the other. And with Coyajee's retirement he felt orphaned. He approached Sir Jamshedji in our chambers saying, 'Jamshedji, *aproo* future *soo*?' (Jamshedji, what of my future?) The instant reaction of Sir Jamshedji was to sit up in his chair and angrily say, 'Future? Future? Jehangir, *taree oomer soo*?' (Jehangir, how old are you now?) Jehangirji – sheepishly looking at all of us youngsters sitting around listening in – softly said, '*Beyassi*' (82). Jamshedji responded quick as a flash, '*Aek pug goar ma ne tu* future *nee soo vat karech*?' (With one foot in the grave, how dare you talk of your future?) That was the 'youthful' response of a 90-year-old to an 82-year-old! I have never forgotten this admonition!

A few months ago, I addressed an international seminar in New York and was introduced to the audience by a 'friend' who said (with a wink and tongue in cheek) that 'Mr Nariman is also President of the Bar Association of India almost since the time of the Norman Conquest'; a gentle hint, perhaps, that I retire from official positions (and active practice). Well, who knows, someday I might. But as advised at present, I propose to die with my boots on!

I must end with a note of apprehension.

My greatest regret in a long, happy, interesting life is the intolerance that has crept into our society. For centuries, Hinduism had been the most tolerant of all religions. But over the past few years, I have been a reluctant spectator of a new phenomenon. The Hindu tradition of tolerance is under immense strain – the strain of religious tension fanned by fanaticism. This

'great orchestra of different languages' and 'praying to different Gods'[4] – that we proudly call India – is now seen and heard playing out of tune.

Is Hinduism changing its face? I hope not. But I fear it is. It is as well to express this fear openly. Secular India versus militant Hinduism is reminiscent of US Ambassador George Keenan's metaphor of contrasting democracy with a dinosaur. In his memoirs[5] he writes:

> But I sometimes wonder whether in this respect a democracy is not uncomfortably similar to one of those prehistoric monsters with a body as long as this room and a brain the size of a pin: he lies there in his comfortable primeval mud and pays little attention to his environment; he is slow to wrath – in fact, you practically have to whack his tail off to make him aware that his interests are being disturbed; but, once he grasps this, he lays about him with such blind determination that he not only destroys his adversary but largely wrecks his native habitat.

We, in India, must not let the dinosaur destroy our habitat. Look back a little and reflect on what a great patriot of India had to say – a man whose birth anniversary we ritualistically celebrate in November each year. He never regarded the varied peoples of India as the dinosaur looked at the Earth's smaller inhabitants. Writing in the quiet seclusion of a prison in 1944 (his ninth term of imprisonment for revolting against the British), Jawaharlal Nehru contemplated the diversity and unity of India:

> The diversity of India is tremendous; it is obvious: it lies on the surface and anybody can see it. It concerns itself with physical appearances as well as with certain mental habits and traits. There is little in common, to outward seeming, between the Pathan of the Northwest and the Tamil in the far South. Their racial stocks are not the same, though there may be common strands running through them; they differ in face and figure, food and clothing, and, of course, language … The Pathan and Tamil are two extreme examples; the others lie somewhere in between. All of them have still more the distinguishing mark of India. It is fascinating to find how the Bengalis, the Marathas, the Gujaratis, the Tamils, the Andhras, the Oriyas, the Assamese, the Canarese, the Malayalis, the Sindhis, the Punjabis, the Pathans, the Kashmiris, the Rajputs, and the great central block comprising the

> Hindustani-speaking people, have retained their peculiar characteristics for hundreds of years, have still more or less the same virtues and failings of which old tradition or record tells us, and yet have been throughout these ages distinctively Indian, with the same national heritage and the same set of moral and mental qualities.
>
> There was something living and dynamic about this heritage, which showed itself in ways of living and a philosophical attitude to life and its problems. Ancient India, like ancient China, was a world in itself, a culture and a civilization which gave shape to all things. Foreign influences poured in and often influenced that culture and were absorbed. Disruptive tendencies gave rise immediately to an attempt to find a synthesis. Some kind of a dream of unity has occupied the mind of India since the dawn of civilization. That unity was not conceived as something imposed from outside, a standardization of externals or even of beliefs. It was something deeper and, within its fold, the widest tolerance of beliefs and customs was practiced and every variety acknowledged and even encouraged.
>
> In ancient and medieval times, the idea of the modern nation was non-existent, and feudal, religious, racial, and cultural bonds had more importance. Yet I think that at almost any time in recorded history an Indian would have felt more or less at home in any part of India, and would have felt as a stranger and alien in any other country. He would certainly have felt less of a stranger in countries which had partly adopted his culture or religion. Those, such as Christians, Jews, Parsees, or Moslems, who professed a religion of non-Indian origin or, coming to India, settled down there, became distinctively Indian in the course of a few generations. Indian converts to some of these religions never ceased to be Indians on account of a change of their faith. They were looked upon in other countries as Indians and foreigners, even though there might have been a community of faith between them.[6]

Many Hindus, Sikhs, Christians, Muslims and Buddhists – in fact, most Indians – would endorse Nehru's vision of the diversity and unity of India.

But the population of the dinosaurs is increasing at a fearsome pace. Dinosaurs in one religious camp give impetus to breeding them in another. Scientists tell us that it was a great meteorite that finally destroyed all the

dinosaurs on this Earth. If so, I like to think that the meteor was the symbolic wrath of God.

I belong to a minority community, a microscopic, wholly insignificant minority, which spurned the offer made (at the time of the drafting of our Constitution) – to Anglo-Indians and Parsis alike – to have, for at least a decade, one special representative in Parliament. We rejected the offer. In the Constituent Assembly, Sir Homi Mody said that we Parsis would rather join the mainstream of a free India. We did, and we have no regrets. We have made good, just as my mother's ancestors (the Burjorjees of Calicut) – two centuries ago – made good in Burma.

I have never felt that I lived in this country at the sufferance of the majority. I have been brought up to think and feel that the minorities, together with the majority community, are integral parts of India.

I have lived and flourished in a secular India. In the fullness of time if God wills, I would also like to die in a secular India.

Notes and References

1. It has since expanded into nine editions.

2. This is a quote from the book, *Justice Oliver Wendell Holmes: Law and the Inner Self* (1995), G. Edward White, Oxford University Press, United States of America, p. 464.

3. Like Khushwant Singh (literature and education), Professor (Dr) Balu Sankaran (medicine), N. N. Vohra (civil service), Naresh Chandra (civil service), Justice (Retd) P. N. Bhagwati (public affairs), Dr Raja Jesudoss Chelliah (public affairs), Sudarshan Erinackal Chandy George (science and engineering) and Dr V. Krishnamurthy (civil service).

4. From the stirring words of A. M. Rosenthal (long serving senior editor of the *International Herald Tribune*) which I must quote:

When India voted, a whole world voted.

A whole world – hundreds of millions of people, speaking in a great orchestra of different languages, praying to different gods, living

in a continental hugeness that not long ago was divided into hundreds of principalities people driven to centuries of war against each other by rulers seeking conquest, foreigners seeking booty, religious zealots seeking blood, educated people by the millions, illiterate peasants by the scores of millions, from mountains through great stretches of plains to southern seas.

On my mind – The World of India (1 December 1989), A. M. Rosenthal

5. *Memoirs: 1925–1950* (1967), George Keenan, Pantheon Publishers

6. *The Discovery of India* (1964), Jawaharlal Nehru, Signet Press, Calcutta, pp. 55–57. His book greatly inspired me and my generation of students and instilled in us a love of India. I have, in and out of Parliament, repeatedly pleaded with successive ministers of education at the centre to prescribe Nehru's *The Discovery of India* as text books in schools and colleges, but this plea of mine has always fallen on deaf ears.

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I have already mentioned my wife, Bapsi, and how much I owe to her staunch support. Now a word or two about our otherwise small family: Bapsi and I have been blessed with the finest and most intelligent children that one could wish for. A brilliant son, Rohinton, who is a most successful senior advocate in the Supreme Court; his memory of cases, people and events is phenomenal, and his vast general knowledge helps to make him a superb lawyer. Besides, he is also our devoted and God-fearing priest; the only one in the Nariman family. Our ever-loving, ever-caring daughter, Anaheeta, is a highly qualified speech therapist and helps the handicapped and differently abled in Bombay. Justice O. Chinnappa Reddy, an affectionate old friend, remembers her the most amongst the Narimans and always inquires after her! And we are fortunate to have a highly educated, competent and loving daughter-in-law, Sanaya. She is the only member of the Nariman family entitled to call herself 'doctor' because she has earned a PhD in Sociology. Although I have been conferred Doctorates of Law by two national universities, I cannot sport the prefix 'doctor' because these distinctions are only honoris causa. That's not all, God has been kind. We have been twice blessed by the warmth and affection of our two dearly beloved grandchildren, Nina and Khursheed, whom we greatly adore and cherish.

I must mention my hard-working junior, Subhash Sharma, who has been with me for nearly 25 years, devoted and loyal, and always a great help; my large staff headed by Vinod Anand (my faithful, long-suffering personal secretary) has patiently endured my frequent tantrums of rage: without him (and them) all activities, especially my extra-curricular ones, would have come to a standstill!

I almost forgot to mention my publisher Ashok Chopra of Hay House. It was he who broached the idea for this book. And over the months, with gentle persuasion, he weaned me off my bouts of procrastination. But for his persistence, the story of my professional life would have still remained unfinished. I have much to thank him for.