Quest for Justice

Fali S. Nariman
(Senior Advocate, Supreme Court of India)

First Nani A. Palkhivala Memorial Lecture

Published by
Nani A. Palkhivala Memorial Trust

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Phone : (022) 5662 4969 ● E-mail : ipw@vsnl.net

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Miss S. K. Bharucha, Member-Secretary
Nani A. Palkhivala Memorial Trust
C/o. Forum of Free Enterprise
Peninsula House (2nd floor),
235, Dr. D.N. Road, Mumbai 400 001.
Telephone : 22703426 ● Telefax: 22614253
E-mail : ffe@vsnl.net

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INTRODUCTION

The Nani A. Palkhivala Memorial Trust was privileged to have Mr. Fali Nariman, the eminent jurist and former Additional Solicitor-General of India to deliver the First Nani A. Palkhivala Memorial Lecture on the subject “Quest for Justice”.

Given Mr. Nariman’s close association with the late Mr. Palkhivala and the deep sense of values which he shared with him as also his own record as a consistent fighter for personal freedom and the preservation of human rights, no other person would have been more appropriate to deliver this First Memorial Lecture.

In a lecture which is so well researched and documented and replete with his customary wit and which reflects his vast experience and knowledge, Mr. Nariman has given a powerful message which needs our urgent consideration.

As he has pointed out “Personal freedom is like oxygen in the air – we do not realize its worth till it is withdrawn and then it is too late” and that there exists, even today, after fifty-six years of independence, a wall of separation between those who govern and those who are governed and we cannot hope to give justice to the people unless we citizens (in all walks of life) bring down this “wall” and become sensitive to the needs, expectations and aspirations of the majority of our people.

This gist of his message is the importance of Justice in every society. He has quoted Abraham Ibn Ezra, a 12th century philosopher and poet who said “it is a known fact that every kingdom based on Justice will stand. Justice is like a building. Injustice is like the cracks in that building which causes it to fall without a moment’s warning”. As he has reminded us, we have a plenitude of laws but not enough Justice and as citizens we have been obsessed with citizens’ rights to the supreme neglect of citizens’ responsibilities.

He has also warned that corruption has eaten into the vitals of the body politic and entered into the psyche of the citizenry and that when a nation believes that its leaders and officials (or a majority of them) are corrupt and take bribes, it devalues and debases the people and has an ever widening deleterious ripple effect on the general milieu.

The text of the Lecture is reproduced in this booklet which is intended to be widely distributed. The Trustees hope that it will provoke a debate on these issues which are so relevant for the future well-being of our nation.

Y H MALEGAM
Chairman
Nani A. Palkhivala
Memorial Trust.

Mumbai : 19th June 2004

NANI A. PALKHIVALA MEMORIAL TRUST

We hardly need to introduce you to the life and work of the late Nani A. Palkhivala who passed away on 11th December 2002. He was a legend in his lifetime. An outstanding jurist, an authority on constitutional and taxation laws, the late Nani Palkhivala's contribution to these fields and to several others such as economics, diplomacy and philosophy are of lasting value for the country. He was a passionate democrat and patriot, and above all, he was a great human being.

Friends and admirers of Nani Palkhivala decided to perpetuate his memory through the creation of a public charitable trust to promote and foster the causes and concerns that were close to his heart.

The main object of the Trust is the promotion, support and advancement of the causes that Nani Palkhivala ceaselessly espoused, such as democratic institutions, personal and civil liberties and rights enshrined in the Constitution, a society governed by just, fair and equitable laws and the institutions that oversee them, the primacy of liberal economic thinking for national development and preservation of India's priceless heritage in all its aspects.

The Trust is registered under the Bombay Public Trusts Act, 1950.

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F. S. NARIMAN

Born on 10th January 1929 in Rangoon, Mr. Fali S. Nariman is a Senior Advocate of the Supreme Court of India where he has been practising since 1972. He enrolled as an Advocate of the Bombay High Court in 1950. He was appointed Additional Solicitor-General of India in May 1972 which office he held till 26th June 1975 when he resigned his office a day after the internal Emergency was declared on 25th June 1975.

He has been President of the Bar Association of India since 1991; Vice-Chairman of the International Court of Arbitration of the International Chamber of Commerce, Paris, since 1989; and also Honorary Chairman of the International Council for Commercial Arbitration since May 2002 having been its President from October, 1994 to May 2002. He is currently co-Chairman of the Human Rights Institute of the International Bar Association since July 2001; Honorary Member, International Commission of Jurists (Geneva) since 1998; was Chairman of the Executive Committee of the International Commission of Jurists from 1995 to 1997; Member, Advisory Council of Jurists of the Asia-Pacific Forum of National Human Rights Institutions since 1999; and a member of the Advisory Board of (UNCTAD) since November 1999.

In 1991 Mr. Nariman was awarded the PADMA BHUSHAN; On 22nd November 1999 Mr. Nariman was nominated by the President of India as a Member of Parliament (Rajya Sabha). Mr. Nariman was awarded the JUSTICE PRIZE 2002 by the Peter Gruber Foundation, which consists of a Gold Medal and a cash prize of US $ 1,50,000/-. The citation reads - “He has over many years given exceptional leadership in a legal community whose thinkers and doers have inspired the development of a creative jurisprudence that facilitates the binding together of a diverse nation, helps control the exercise of public power and seeks to enable the poor, minorities and the marginalized to claim their basic rights to human dignity.” The award was presented on September 22, 2002, in Richmond, Virginia (U.S.A.) at the ancestral home of John Marshall the great Chief Justice of the U.S. (1803-1835).

NANI A. PALKHIVALA
16 January 1920 – 11 December 2002

NANI ARDESHIR PALKHIVALA

In 1972-73 the full Bench of thirteen judges of the Supreme Court of India heard with rapt attention a handsome lawyer argue for five months before them that the Constitution of India, which guaranteed fundamental freedoms to the people, was supreme and Parliament had no power to abridge those rights.The Judges peppered him with questions. A jam-packed Court, corridors overflowing with members of the Bar and people who had come from far-away places just to hear the lawyer argue, were thrilled to hear him quote in reply, chapter and verse from the U.S., Irish, Canadian, Australian and other democractic constitutions of the world.

Finally came the judgment in April 1973 in *Kesavananda Bharati v. State of Kerala,* popularly known as the *Fundamental Rights* case. The historic pronouncement was that though Parliament could amend the Constitution, it had no right to alter the basic structure of it.

The doyen of Indian journalists, Durga Das, congratulated the lawyer: “You have salvaged something precious from the wreck of the constitutional structure which politicians have razed to the ground.” This “something precious” - the sanctity of “the basic strucuture” of the Constitution - saved India from going fully down the totalitarian way during the dark days of the Emergency (1975-77) imposed by Mrs. Indira Gandhi.

Soon after the proclamation of the Emergency on 25th June 1975, the Government of India sought to get the judgment reversed, in an atmosphere of covert terrorization of the judiciary, rigorous press censorship, and mass arrests without trial, so as to pave the way for the suspension of fundamental freedoms and establishment of a totalitarian state. Once again, braving the rulers’ wrath, this lawyer came

to the defence of the citizen. His six-page propositions before the Supreme Court and arguments extending over two days were so convincing that the Bench was dissolved and the Court dropped the matter altogether. Commented a Judge: "Never before in the history of the Court has there been a performance like that. With his passionate plea for human freedoms and irrefutable logic, he convinced the Court that the earlier *Kesavananda Bharati* case judgment should not be reversed."

This man who saved the Indian Constitution for generations unborn, was Nani Ardeshir Palkhivala. His greatness as a lawyer is summed up in the words of Justice H.R. Khanna of the Supreme Court: "If a count were to be made of the ten topmost lawyers of the world, I have no doubt that Mr. Palkhivala's name would find a prominent mention therein". The late Prime Minister Morarji Desai described him to Barun Gupta, the famous journalist, as "the country's finest intellecual". Rajaji described him as "God's gift to India".

Nani A. Palkhivala, who passed away on 11th December, 2002, was for four decades one of the dominant figures in India's public life. An outstanding jurist, redoubtable champion of freedom and above all a great humanist.

Born on 16th January 1920, Mr. Palkhivala had a brilliant academic career. He stood first class first in both his LL.B., (1943) exams and in the Advocate (Original Side) Examination of the Bombay High Court.

His expositions on the Union Budget in Mumbai and other places were immensely popular and attracted attendance in excess of 1,00,000. He eloquently espoused the cause for a more rational and equitable tax regime.

He was India's Ambassador to the U.S.A. from 1977 to 1979. While in the U.S. as India's Ambassador, he delivered more than 170 speeches in different cities which included

speeches at over 50 Universities. He was also invited by various Universities and institutions in other countries to address them.

In April 1979, the Lawrence University, Wisconsin (U.S.A.), conferred on Mr. Palkhivala, the Honorary Degree of Doctor of Laws with the following Citation:

"...As India's leading author, scholar, teacher and practitioner of constitional law, you have defended the individual, be he prince or pauper, against the state; you have championed free speech and an unfettered press; you have protected the autonomy of the religious and educational institutions of the minorities; you have fought for the preservation of independent social organizations and multiple centres of civic power... Never more did you live your principles than during the recent 19-month ordeal which India went through in what was called "The Emergency".... Under the shadow of near tyranny, at great risk and some cost, you raised the torch of freedom..."

In 1997 Mr. Palkhivala was conferred the Dadabhai Naoroji Memorial Award for advancing the interests of India by his contribution towards public education in economic affairs and constitutional law. In 1998 he was honoured by the Government of India with PADMA VIBHUSHAN. The Mumbai University conferred upon him with a honorary Degree of Doctor of Laws (LL.D.) in 1998.

Mr. Palkhivala was associated with the Tata group for about four decades. He was Chairman of Tata Consultancy Services, Tata International Ltd., Tata Infotech Ltd., the Associated Cement Companies Ltd., and was Director of Tata Sons Ltd., and several other companies. He was President of Forum of Free Enterprise from 1968 till 2000, and Chairman of the A. D. Shroff Memorial Trust from 1966 till his death.

QUEST FOR JUSTICE

by Fali S. Nariman*

Nani Palkhivala was in the Government Law College when I was in Government Law College, but he was my Professor and I was his student. The bond of almost filial friendship that developed between us continued over the years, despite his meteoric success both at the Bar and in public life. I feel especially privileged, ladies and gentleman, to deliver this First Nani Palkhivala Memorial Lecture.

I have been impressed (and somewhat chastened) by a story that I heard many years ago related at a Conference of the International Bar Association in New York. In his inaugural address to that Conference, the Chief Justice of the New York State Court of Appeals told us all how when he was first appointed Chief Judge, he proudly showed his wife the chair in the courtroom of his illustrious predecessor-in-office of nearly half a century ago, Chief Justice Benjamin Cardozo (a legend amongst Judges of the United States). And he said to his wife in a reverential whisper, “See - this is Cardozo’s chair and this is where I will sit”. His wife responded not very reverentially: “Yes - and after fifty years and five more Chief Justices it will still be Cardozo’s chair”!

I like to think that though 16th January will be the occasion for a Memorial Lecture, no matter who the speaker is – it will always be the Nani Palkhivala Memorial Lecture.

There must be some particular reason for remembering Nani Palkhivala – I believe it is not so much for his forensic eloquence, nor for his budget speeches, which drew literally a hundred

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* *The author is Senior Advocate, Supreme Court of India. The text is based on the First Nani A. Palkhivala Memorial Lecture delivered in Mumbai on 16th January 2004 under the auspices of the Trust.*

thousand listeners nor even for his forthright criticism of the Government and its policies. I believe that we remember him and honour him because he loved individual freedom and fought for it against great odds. He saved our Constitution, as well as our fundamental rights when they needed saving from a brute parliamentary majority.

For those of us like myself who were born before the beginning of the 2nd World War, when we saw that gentlemen's game cricket played as it should be played, the world was divided into two class of leaders – in any field of activity – they were either in the 'Bradman class' or the 'Hobbs class'. Nani Palkhivalla was, by common acclaim, in the Bradman class. He attained this Super Class distinction by three famous wins:

First, in 1967 when he argued the famous Golaknath case before a Bench of eleven Judges – and won. You must realise the atmosphere of the time – when an over-whelming majority of the Congress Party was keen to push through Constitutional Amendments in violation of the Fundamental Rights.

Next – when in 1973 he argued even more famous constitutional case – *Keshavananda* – before a Bench of 13 judges – and narrowly won again. The atmosphere was even more surcharged, than in *Golaknath* – so great was the ill-feeling generated amongst the judges that some of them even refused to sign the final order as to what the majority had decided in the case! The Judges were sharply divided on the great question as to whether there was any part of the Constitution which could not be altered or amended; and by a narrow majority it was said that there were certain unalterable provisions of our democratic Constitution which constituted a part of its basic structure, which even an overwhelming Parliamentary majority could not alter or amend.

When two years later (1975) in Mrs. Gandhi's Election case the Supreme Court finally affirmed the basic structure doctrine, just three days after the judgment in this case was pronounced, Chief Justice Ray convened another Bench of thirteen Judges to overturn the doctrine of basic structure. The question posed was: Whether the power of amendment of the Constitution was restricted to the theory of basic structure and framework as propounded in the *Keshavananda* case? This was really Nani's finest hour – after an argument lasting over two days – a solo performance – the special Bench of thirteen Judges specially constituted to hear this most important question was unceremoniously dissolved. After Palkhivala argued for over five hours, almost all the Judges, except the Chief Justice, were convinced that the basic structure theory propounded in *Keshvananda* was constitutionally correct and sound.

You will not find this case reported in any of the law reports – only a brief mention of it is made by India's Constitutional historian Mr. H. M. Seervai in his book on Constitutional law[1]. But in India's constitutional history it was, and it is, the real turning point for the Supreme Court. This was the occasion when a clear message went out that the Court was retaining to itself the custody and control of the Constitution - which in the nineteen seventies was in grave danger of being taken over by a majoritarian Parliament. Few of us realise or appreciate this grave threat to our freedom and democracy – since we live and have lived for more than thirty years with minority Governments at the Centre: and public memory alas, is proverbially short.

Palkhivala knew, like no one else did, that personal freedom is like oxygen in the air – we do not realise its worth till it is

[1] *Seervai, Constitutional Law of India (4th Edition) Vol-2 p=1957*

withdrawn, and then it is too late! Judges, lawyers, law students and citizens must need bear this in mind – for it is they who in the end help to protect and uphold our fundamental rights and create a climate for their exercise.

A particular Article in our Constitution – Article 31C – enacted in its extended form during the 1975 Emergency had said that no legislation could be challenged for violation of any of the fundamental rights if Parliament or a State Legislature said that the law was to implement a basic principle of State Policy. Palkhivala launched a challenge to the Constitutional validity of this Article almost single handedly – at a time when it was unpopular to do so, and when it was lauded by some of the country's eminent Judges and lawyers.

If this Article in its wide plenitude had remained a part of our Constitution, and had not been struck down by the majority in a Bench of five Judges in the *Minerva Mills* case (1980) – again, a signal Palkhivala victory - not only Parliament, but more realistically any State legislature, could have by ordinary law effectively censored the press, and prohibited public speaking on any topic without a police permit, on the specious and vague plea that it was for implementing some particular directive of State Policy. This is the personal liberty that the Supreme Court of India (or a perceptive majority of its Judges) has helped us save, - in the leading case of *Minerva Mills* and for this, we lawyers and we citizens must be forever grateful and beholden to the Court – but above all to Mr. Palkhivala.

This then, is the importance and significance of the Nani Palkhivala Memorial Lecture. It matters not who delivers it this evening, or next year or the year after, we will, and we must, always remember this occasion as a birthday of a great lawyer, a great lover of individual freedom and a great patriot.

The subject of this First Memorial Lecture is based on what was written by a medieval scholar, long, long ago. His name was Abraham Ibn Ezra. He was a philosopher and poet who lived in Spain in the early 12th century. He travelled widely, and enriched by the experience gained from his travels, he set down in three short sentences the vital importance of JUSTICE in every society. This is what he wrote (and I quote): "It is a known fact that every kingdom based on Justice will stand. Justice is like a building. Injustice is like the cracks in that building which cause it to fall without a moment's warning."

Fifty–six years after independence we have a plenitude of laws, but not enough Justice: the cracks in the edifice we all helped to build in the year 1947 are now showing: and we have to ask ourselves why. Nani, when he was alive, had many answers to offer – but alas he is no more. And we have to make a search for ourselves. Perhaps in this as in other conundrums of the present, an answer can be found only if we look back into the distant past.

In one of Plato's dialogues (recorded in The Republic) there is a passage about justice and right conduct. In it, Plato's friend and teacher, Socrates, appears as the narrator. Socrates tells Glaucon (an elder brother of Plato): "The time then has arrived, Glaucon, when like huntsmen we should surround the cover, and look sharp that justice does not slip away and pass out of sight, and get lost; for there can be no doubt that we are in the right direction….."

"Lead on", says Glaucon. And they both move on in search of Justice only to find that their quarry has been lurking right under their feet all the time and yet they haven't seen it! Socrates then tells Glaucon: "We are like people searching for something they have in their hands all the time and looking away into the distance instead of at the thing we want…. which is probably why we haven't found it"[2].

[2] *Plato – The Republic – Penguin Classics (Second Edition): Book iv, 431.*

It is perhaps for the same reason – that in this 21st century we citizens of India are still looking away into the distance at the thing we want (JUSTICE) – which is probably why we haven't yet found it.

The Preamble to our Constitution – the Constitution of India, 1950 –had proudly proclaimed: "We the people of India, having solemnly resolved ……. to secure to all its citizens: JUSTICE, social, economic and political……"

The most evocative words are the first three "We, the People". Palkhivala chose this as the title of a series of essays on Constitutional law published in 1969.

"We, the people" - are also the opening words of the world's oldest Constitution – the Constitution of the United States.

The overwhelming majority of India's now overpopulated millions – who were not born before 1950 – were certainly not included in "We, the people". How then do they come in? A shrewd politician in the United States gave an answer to a like question raised some years ago. She said – yes, it was a woman – a Congresswoman – she said (referring to the US Constitution): "We, the people" is a very eloquent beginning. But, when that document was completed on 17th September, 1787, I was not included in that. I felt somehow for many years that George Washington and Alexander Hamilton just left me out by mistake. But I realize that it is through the process of interpretation and Court decision that I have been finally included in "We, the people."

Well, that in a nutshell describes what has been the role of our Supreme Court – by interpretation and Court decision it has broadened the reach of the Constitution's provisions; it has included within the range of its beneficent provisions those who were not born when India got its independence.

The Supreme Court of India came into existence simultaneously with the Constitution – on January 26, 1950. Four years later one its first judges (Justice Vivian Bose) described, in the course of a judgment, what the constitutional provisions meant 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".[3] Eloquent words. I like to think of the "flaming sword" as that embodied in one of the provisions of our Constitution (Article 142) – which empowers the Supreme Court of India 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. Since laws are not made for particular cases but for citizens in general, there has to be that rare occasion when adherence to enacted law leads to injustice. Hence the deliberate conferment of power on the country's highest Court, to make such orders as are necessary for doing complete justice.

This is the trust that the founding fathers placed in the Justices of our Supreme Court; a trust boldly accepted by Chief Justice Subba Rao when he delivered the majority judgment in *Golaknath's* case (1967). In it he had said (relying on Article 142) that the doctrine of prospective overruling – an innovative legal doctrine enunciated for the first time by that learned Judge – could only be invoked by the Judges of the Supreme Court, and by no other Judge in India. Under this doctrine judges could declare the law for the future alone, without disturbing the law for the past. The majority judgment in *Golaknath* has since been overruled[4] and though the doctrine of prospective

[3] *Virendra Singh vs. State of U.P. – AIR 1954 Supreme Court 447 at 454.*

[4] *See Kesavananda Bharati vs. State of Kerala: AIR 1973 SC 1461*

overruling still applies – it is no longer confined to the Judges of the Highest Court: it can be invoked by the High Courts as well.

Except for a single decision of the year 1991[5], the Justices of the Highest Court have consistently refused to accept the onerous responsibility of administering justice under all contingencies – i.e. justice in accordance with law wherever possible, and justice not in accordance with written law wherever necessary.

They have now said – that nothing can be done even by the highest Court where the law stands in the way – and that Justice must pay obeisance to enacted law.[6] This may be correct in legal theory, but it is conceptually erroneous. After all the only reason why this power was reserved (under Article 142) to be exercised by the Justices of the highest Court was because they, above all others, were to be trusted more than any of the other Judges in the entire country – They could never be expected to do anything wrong, anything contrary to Justice.

That is the faith the Constitution had expressed in the Judges of the Supreme Court – a faith unfortunately not reciprocated, after the year 1967, by the Justices in themselves.

If the opening words of our Constitution – tell us at the start, who this Constitution is for - then in a pluralistic society like ours, in a vast sub-continent like this, in this land of a "million mutinies" – (as V.S. Naipaul describes it), who are the people? For me, they are all exemplified in that great cartoonist R K Laxman's "Common Man." He typifies the quizzical doubts about who this great document is for: And do remember – each generation (of thirty years) throws up its Common Man.

[5] *Delhi Judicial Service vs. State of Gujarat: AIR 1991 SC 2176*

[6] *Union Carbide Corporation vs. Union of India: 1991 (4) SCC 584; and Supreme Court Bar Association vs. Union of India : AIR 1998 SC 1895*

There have been nearly three generations since 1950 and if we are to show the present generation (typified by Laxman's Common Man) this document of our governance or tell him about it, he is bound to ask on behalf of the people he represents: "Tell me what has it done for us? How are we better off ?"

And alas, we would be compelled to look the other way. Not because our Courts have failed – they have not: by various innovative expedients of PIL (Public Interest Litigation) and spurts of judicial hyper-activism and a broad and liberal interpretation of the Equality Clause (Article 14), our Courts have at least strived to steer the law as far as possible into the paths of justice, and bring relief at the common man's door. No - we are compelled to look the other way because of our own inherent inadequacies: first, because of our obsession with citizens' rights and our supreme neglect of citizens' responsibilities and second, because we are not as a nation imbued with a sense of fair dealing, nor with an abiding sense of justice between citizen and citizen.

Let me explain. We in this country – and people in most countries around the world – live in an age of an all pervading rights culture. We claim a right to this and a right to that. 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. In India today, we find ourselves in a stage of profound discontent, simply because we have forgotten our responsibilities to one another.

Many decades ago, soon after the end of the Second World War the Human Rights Commission of the United Nations

carried out an inquiry into the theoretical problems raised by the then proposed (it was then only proposed) universal declaration of human rights. A questionnaire was circulated to various thinkers and writers living in the Member-States of UNESCO. They were asked, as individual experts, to give their views. One of them was Gandhiji. He responded in a brief, but now almost forgotten letter to Dr. Julian Huxley (then Director of UNESCO). The letter was written in May, 1947, in a moving train. Those were troubled times – the days before India's Independence when Gandhiji was constantly on the move. This is what Gandhiji wrote:

"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." How true, – how profound – and yet how simply put.

When we gave ourselves a written Constitution it was certainly good to provide rights enforceable against the State and agencies of the State (as we did in our Fundamental Rights Chapter). But I believe that it would have made a great difference to our attitudes, our sense of discipline and our national consciousness if we had also stressed the duties and responsibilities of one citizen to another.

Regarding the second, aspect – the lack of an abiding spirit of fairness and justice in citizens – our Constitution envisages JUSTICE to be handed down not only by Courts – when adjudicating disputes, but by all sections of society in their dealings with their fellow–citizens. We all are expected to be inspired with an abiding sense of justice and to act accordingly.

Our Fundamental Rights Chapter has enabled Courts to bring to account States, State Governments and their officials – but regrettably we do not have a self-fulfilling Civil Rights Act: as in the United States where important rights of equality and non-discrimination can be enforced in Courts by individuals against individuals, firms and Corporations.

The three-tier Court-delivery system in our country replicates the British pattern – meant only to be resorted to as a last option, when persuasion and negotiation fail. It is necessarily slow and ponderous – perhaps deliberately so.

A former Lord Chancellor of England (Lord Hailsham) had this in mind when, speaking of legal aid schemes, he said: "I hope that no one will ever come to think that by the introduction of schemes of this kind, litigation can ever be said to be a good thing. It is, in its nature an evil, a concession which we make to the follies and wickedness of mankind; it can never be anything else."

Court proceedings in the country could be made to move more swiftly - if the officials, ministers and bureaucrats, whether at the Centre or at State level, are more sensitised to the need for justice at all levels of society. It is because they are not so sensitised, that recourse is had to cumbrous litigious processes which take years to end.

More than sixty percent of pending Court cases in India are the result of "State" action or inaction; because some official of the Central or State Government or some officer of a Central or State Agency of Government has failed to act fairly or justly towards a citizen or a group of citizens. And even when some official higher up in the hierarchy of decision–making finds that there has been an injustice – he feels helpless, because if he concedes to a just claim being allowed he would be accused of improper motives.

So what enters the litigious process at the bottom has to go all the way to the top – when in the fullness of time and over years of travail, justice is meted out to the claimant. So exasperated is the litigant at the end of the ordeal – when pitted against the might of the State – that he is often heard to say to whosoever is willing to listen: "Injustice is easy to bear, what stings is justice"!

And then there is gender injustice. Our Constitution proudly proclaims in Article 15 that although the State is prohibited from discriminating on grounds only of sex, nothing shall prevent the State from making special provisions for women and children. All very well said; but hardly ever practised.

Even in this year of grace 2004 Hindu law continues to discriminate against a large segment of India's teeming millions – Hindu women: for instance despite the many other emancipating provisions of the Hindu Succession Act, 1956, daughters are still not entitled to equal rights of a son in ancestral property.

And as for a divorced Muslim woman – divorced because her husband says so three times, as for such a woman – the law had given her a right to claim from her erstwhile Muslim husband a monthly sum as maintenance for under the provisions of the Code of Criminal Procedure this was her right till the year 1986. In that year, Parliament simply enacted in the wake of the infamous *Shah Banu* case[7] a law hypocritically titled: "The Muslim Women Protection of Rights on Divorce Act,1986". The consequence is that a Muslim woman must now rest content with maintenance only during the period of Iddat: a sum stipulated by the husband at the time of marriage, to be paid for a limited period of three months after talaq (or customary divorce). She can no longer move an application for

[7] *Mohd. Ahmed Khan vs. Shah Bano Begum – AIR 1985 Supreme Court 945.*

maintenance under Section 125 of the Criminal Procedure Code. This then is how our laws still treat women folk – Hindu and Muslim.

The other day one of our newspapers reported a quote from a French woman Francoise Giroud. She was asked How long would she fight for equality between the sexes? Her answer was frank and was practical. She said: "Until incompetent women can hold important jobs, like men do…" In India this will be a long time coming.

The reason why justice is not meted out to the vast majority of people even though appropriate laws are in place is mainly because of the failure on the part of executive government and administrative agencies to implement laws which give effect to directive principles of State policy. This is not merely for lack of will, but for a lack of understanding as well.

Aleksandr Solzhenitsyn, the great Russian critic of the Communist system of Government (when it was unpopular and dangerous to be its critic) had once said something very significant: He had said: "A man used to moving about the streets riding in a motor-car can never understand a pedestrian – even at a symposium or at a forum." People in the upper echelons of Society and the people who administer the law, the bureaucrats and officials are simply out of touch with the common man and the common people.

Next only to population, the major problem about governance in our country is the enormous divide, the wall of separation, between the governed and those who govern. We have inherited this from over two hundred years of Mughal Rule, followed by more than a century of British Rule.

Way back in the nineteen forties when I was in college (in British India) it used to be jokingly suggested that the fall of the British Empire began with the building of country clubs – because

once you built 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 behind a wall of separation – because they ruled and made no pretence about it. They ruled, they did not govern; and, hence had few problems of governance. But they had one great quality – they instilled in their officials who ruled, a high sense of idealism in Government service. It went a long way. 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.[8]

When the British left, we kept the wall of separation, but discarded the idealism which had inspired generations of public officials in British India. And officialdom has become even more insensitive, even more secretive since independence. The Official Secrets Act of 1923 promulgated by the British for governing colonial India is now – fifty-six years after independence – still in force, alive and kicking. It remains today as one of the great threats to open Government. As some wit has said, it has been continued not to protect secrets, but to protect officials!

There exists even till this day – a wall of separation between those who govern and those who are governed and we cannot hope to give justice to the people unless we citizens (in all walks of life) bring down this "wall", and become sensitive to the needs, expectations and aspirations of the vast majority of our people.

There were two aspects of British rule which we jettisoned with the British Raj. They were mentioned – somewhat pompously – by a British historian, G.M. Trevelyan. He wrote

[8] *Even the Viceroy and the Governor-General of India when he had occasion to respond to petitions and requests, ended his letter with the humbling words "Your Obedient Servant".*

that the reason why the British ruled India for so long was because (to quote him) "we were looked upon as a nation which kept our promises; and as rulers we took no bribes."

As a nation we too started by making promises – and then did not keep them. Even promises embodied in our Constitution to rulers of Indian States remained unfulfilled and when they were broken, Rajaji formed the Swatantra Party: but this Political Party was swept away in the euphoria of populism.

The second part of that quote of Trevelyan is more important: "….as rulers we took no bribes" – though slightly exaggerated, was by and large true.

Public Servants in British India, as a class, were not dishonest. But today fiftysix years after independence we cannot truthfully say the same. Corruption has eaten into the vitals of the body politic and entered into the psyche of the citizenry. There are two types of corruption: one, secret isolated instances; they happen everywhere, they are endemic: but they take place without infecting the body politic. The other type is what has engulfed us – it is known as tidal corruption. It floods the entire State apparatus including those in the seat of power.

Since the nineteen seventies, every Government of India on assuming office has promised the people a clean administration. But administration and governance has become murkier and murkier. This is true not only of India – but of other countries as well.

There is another down-side to the moral degradation in Indian politics. When promises are broken by sovereign nations, when it is believed that its leaders and officials (or a majority of them) are corrupt and take bribes, it devalues and debases the people. Actions of governments have an ever widening ripple effect on the general social milieu of the time. Moral leadership plays a vital role in every State. Aristotle said that people in government

exercise a teaching function. The people see what they do – and do likewise. And when those people do things that are underhand and dishonest, this teaches people too.

In our country those in positions of power are looked up to – fawned upon – as "great men"; and the Bhagwad Gita says that whatsoever a great man does, that very thing other men also do; whatever standard he sets, the generality of men follow the same.

In August last year the Central Vigilance Commission Bill, 2003, came up for consideration before the Rajya Sabha – it had already been passed by the Lok Sabha. It was, and is, meant to stem the rot of corruption in public life by high Government officials. The Bill sets up a three-member Commission, each with guaranteed tenure, appointed on the recommendation of a high-level Committee so that it functions independently of the Central Government. Excellent. But hidden in the verbiage of that Bill – in the small print – is a provision tucked away in a third sub-clause of the sixth section dealing with what is commonly known as the "Single Directive".

Under its provisions any whisper or suspicion of corruption in employees of the Central Government at the level of Joint Secretary and below can be inquired into and investigated by the CBI 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 to be 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". The only rationale offered by the Government for this differentiation was (and is) that it is essential to protect officers at "decision–making levels" and to relieve them of the anxiety and likelihood of harassment from making honest decisions. Once again, an understandable reason. But, when during the debate I

suggested 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", he declined: which 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 Under Secretary 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.

We have of course excellent bureaucrats in the Central Government (and in State Governments). And merely because some government servants are corrupt, the public perception that the entire bureaucracy must be so branded, is a flawed perception.

I recall many years ago that most revered public servant, Mr. Dharamvira, telling me as to how as Cabinet Secretary, he had led a delegation abroad for purchase of some essential defence equipment. After negotiations had concluded, his counter-part on the other side of the table said: "Now Mr. Secretary, how would you like to take the kickback? In whose name shall I

make out the cheque for the discount?" Mr. Dharamvira promptly answered: "Excellency, make it out in the name of the Government of India." And he carried the cheque back to Delhi, and presented it to Panditji. The Prime Minister was furious: "What! you accepted a kickback – it is a disgrace." Mr. Dharmavira kept his cool. He only said: "Panditji, what did you expect me to do? Take it in my name, and put the money in a Swiss Account?"

The point was well made. Panditji was silent. That was the level of integrity of the bureaucrats we had – that is still the level of integrity of some of today's bureaucrats. We need the Central Vigilance Commission Bill not with respect to these few, but for those Departmental Heads whose conduct is suspect. Corruption in officials – like reputations (good and bad) – are difficult to prove; but the label invariably "sticks".

During the debate on the Central Vigilance Commission Bill in the Rajya Sabha my friend and colleague Dr. P.C. Alexander spoke in some anguish. He said: "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." What have we done under this Bill, he queried?

"We have given senior officers protection. Government sanction is needed before even an inquiry can be started against them."

Dr. Alexander termed this clause as the "Enemy Number One of the Bill". And a former Central Vigilance Commissioner, Mr. N. Vittal, had already gone on record to say that the provision was "vicious". They should know. In their time, both were distinguished public servants.

But what is most disturbing to me is the polity in which we live. If we get the government we deserve, I believe that we also get the laws we deserve. What is of regret to me is not that the Government pushed through the Central Vigilance Commission Bill, 2003, (most of whose other provisions are 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, which was in August of last year in an effective position to ensure that the obnoxious Single Directive Clause was not passed, also approved the Bill in its entirety.

The quest for justice, has not ended, and we have to keep striving. As for the present, as Shakespeare said – "the fault, dear Brutus, is not in our stars but in ourselves that we are underlings".

In the early 1950s in Bombay – when it was still Bombay – there was a popular weekly called "The Current" edited by Dossu Karaka. He was an agnostic – but he was also a realist. So, on the front page of every weekly edition he got printed the words: MAY GOD SAVE THE MOTHERLAND. I believe that after fifty-six long years we still need that plaintive prayer.

Let me however not end here. Let me conclude on a less pessimistic note – I said a moment ago that the provision with regard to the Single Directive Clause was tucked away in a third sub-clause of the sixth section of the CVC Bill, which recalls an amusing story about an Act of the British Parliament passed more than 150 years ago[9].

It was a private Waterworks Act but that is not why it is remembered. It is remembered because of something else. One hundred and fifty years ago in England, divorce in the modern sense was possible only by Parliamentary law. The

[9] *Megarry: Miscellany at Law (1955) page 345.*

story goes that an unhappily married Town Clerk who had drafted and promoted the Waterworks Bill for his town – a Bill containing 65 clauses, surreptitiously included in the sixty fourth clause – mixed with some technical words about stopcocks and water pipes - an innocent looking phrase which read as follows: “And the Town Clerk’s marriage is hereby dissolved.” Nobody could explain how those words got there. In fact nobody ever noticed them whilst the Bill was going through Britain’s Parliament – because everyone was fast asleep long before they got to that clause. In due course, Royal Assent was given to the Bill. And history records that the Town Clerk lived happily ever after.

And at a ripe old age he died, still in harness, still Town Clerk. A successor had to be found. The question then arose whether this particular provision mischievously put into the Waterworks Bill was personal to the deceased Town Clerk, or whether unhappily married members of the local government service could regard this town clerk-ship as a sort of panacea for their unhappiness. Alas, the books do not record how the matter was ultimately resolved!

This is the end of my piece on the Quest for Justice.

I would like to end this lecture as I began – by remembering Nani Palkhivala. And I do it not in prose, but in poetry – not my poetry but someone else’s – that of Laurence Binyon – adapted for the occasion:

He shall grow not old, as we that are left grow old:

Age shall not weary him, nor the years condemn.

At the going down of the sun and in the morning

We will remember him.

* *The booklet is issued for public education. The views expressed in the booklet are those of the author.*