



**PALKHIVALA**  
**Memorial Lectures**  
**2003-2019**

**Selected Speeches**



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**Palkhivala Memorial Lectures  
2003-2019**

**Selected Speeches**

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## Preface

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Nani Palkhivala, arguably the finest lawyer of his time, passed away on December 12, 2002, in his 82nd year. His was a life of epochal achievements in many fields, law and corporate leadership being the most noted ones. The Palkhivala Foundation, Chennai, a charitable public trust, came into being in February 2003 as an outcome of a few admirers of Palkhivala desiring to perpetuate the memory of this legendary figure.

During his time, Nani Palkhivala had, through his highly acclaimed speeches and writings, conveyed to the public many issues he felt strongly about. He particularly championed the cause of free enterprise, advocated decontrol and deregulation, and tirelessly spoke about the need to have a fair, equitable and simple tax system. His annual public lectures appraising the Union budget became the talking point of the nation and attendance at the event held at the Brabourne stadium in Mumbai, exceeding a lakh of people, has entered the record books for the highest at any public meeting. His articulation, without the aid of any written material, of complex subjects, punctuated with

facts and figures and laced with inoffensive sarcasm, is unparalleled in the realm of public speaking. He was passionate in his attack of any governmental action that affected citizens' liberty and eroded personal freedom. Many are the battles he fought in court to uphold the spirit of the Constitution and repel any attempt to alter its basic structure.

Considering the contribution of Nani Palkhivala to the building of various facets of public thought and debate, the Foundation felt that its foremost objective should be to hold at least one public lecture annually on a subject of contemporary relevance by an eminent speaker. This endeavour has so far seen 34 lectures\* held for the benefit of the general public in Chennai on a variety of subjects of universal relevance by pre-eminent speakers from across a spectrum of expertise. These lectures, to which entry is free, draw large audiences.

A unique feature of the lectures has been the fact that many of the speakers had known Palkhivala personally and their speeches often contained interesting experiences and anecdotes concerning him. In response to a request from the public and to commemorate the birth centenary of Nani Palkhivala on January 16, 2020, it seemed appropriate to compile the lectures, starting with the very first one on March 22, 2003, as an anthology.

Taking into account various suggestions, the lectures have been edited and abridged for ease of reading. Regrettably, a few of the lectures were not available in the archives of the Foundation and had to be left out. Since in most instances no written material was available, the speeches had to be transcribed from audio recordings and edited and condensed without sacrificing the key content and message of the speakers. The Foundation wishes to thank Sandhya Rao and K. Balaji for undertaking this laborious and challenging task.

The lectures also resonate with the personalities of both Nani Palkhivala and the speaker in question. It goes without saying that they articulate the personal views of the speakers and the Foundation assumes no responsibility for the content. However, should readers find errors in

editing, the Foundation requests that its attention be drawn to these so that the relevant corrections may be made in subsequent editions of the book. The Foundation is hopeful that readers, especially those of the younger generation, will benefit from this effort to provide in a nutshell perspectives on important subjects dealt with by erudite speakers over the last 16 years. These matters remain relevant despite the passage of time.

*Trustees*

**Palkhivala Foundation**

Chennai, January 2020

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\* Please see Appendix

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# A Man for the Common Man

Sriram Panchu

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Nani Ardeshir Palkhivala (1920-2002) was a colossus among lawyers and a giant among men. He combined eloquence with wisdom, sincerity with versatility, vision with achievement. His pride of place in the legal firmament stems from his defence of the rights of the citizen against the Government in the great cases of the 1960s and the 1970s — *Golaknath* and *Keshavananda Bharathi* which circumscribed the right of Parliament to affect fundamental rights while amending the Constitution, the bank nationalisation case, rights of minorities to run educational institutions of their choice, the privy purses case, issues of freedom of the press and arbitrary restrictions on newspapers. In each of these he dealt with the matter on hand against the backdrop of the vision of the Founding Fathers, combining unassailable logic with deep learning, to turn out one victory after another. Little wonder then that in her moment of desperation Mrs. Gandhi turned to him to represent her in her appeal before the Supreme Court against the Allahabad Court order setting aside her election for malpractices. And little wonder that he returned her brief when she declared the infamous Emergency. The Government that feared him also respected

him; when India was confronted in international legal forums with Pakistan's claim to territory in Kutch and its claim to overflight rights over India, it was Palkhivala, the defender of the people, who became the Indian Government's champion. All arguments before the World Court at The Hague are read from written briefs; since every word matters and there is not a moment to waste. The solitary exception was Palkhivala, who argued orally, brilliantly, and successfully.

Years before he became the eminence in constitutional law, Palkhivala was an authority on the law of taxation. Barely four years at the Bar, he brought out the *Law and Practice of Income-Tax*, which became the defining treatise on the subject. So much so that Chief Justice Chagla, when faced with a knotty tax case would ask, "What does the book say?" In 1958, Palkhivala gave his first public speech on the budget. He did so every year after — and, in short succession, the venue had to be changed from a hotel to the Jehangir Hall and then to the CCI East Lawns and finally to the one-time Mecca of Indian cricket, Brabourne Stadium itself — all to accommodate the crowds that came to listen. He can justly be credited with drawing more people than Gary Sobers in an India-West Indies match because for his Budget speech the galleries overflowed to the entire cricket ground with thousands standing all through the talk. Indeed as was remarked, there were two budget speeches every year — one by the Finance Minister in Parliament and the other by Palkhivala to the public. No prizes for guessing which was the better one. And to top it all, he spoke without a scrap of paper before him while reeling off figures, facts and statistics, quotations and historical references. In later years public demand saw him travelling the length and breadth of the country to deliver his budget speeches to rapt audiences.

His writings include, *Our Constitution De-faced and Defiled* — a book, which not only showed up legislature and executive for default and foul play, but more importantly, sought to instil in citizens an awareness of their sacred duty to the spirit of liberty and democracy. *We the People* and *We the Nation* speaks of a range of issues and public

causes, which he espoused passionately. *India's Priceless Heritage* and *Essential Unity of All Religions* show how this man of law and the corporate world delved deeply into the realms of spirituality. *Nani Palkhivala – Selected Writings*, a 1999 publication, brings out his erudition, wit, and originality of thought across a range of subjects from the Philosophy of life to Constitutional Reform, from Lawyers in the Dock to the Humanistic Face of Capitalism, from the Treason of the Intellectual to the personalities who have shaped him most — Adi Sankaracharya, Sri Aurobindo, the Mahatma, Jamshedji Kanga whose chambers he joined, Judge par excellence M.C. Chagla and Nusserwanji P. Pavri. The last is an unknown name among the galaxy of the great and it is typical of Palkhivala to remember his schoolteacher to whom “life has not given his meed of reward” as one who encouraged his pupils to “disinterested labour both in trying to do good and in trying to find out what the good is”.

The lawyer and jurist was also a busy board member and Chairman of several companies, notably in the Tata group and ICICI. This did not prevent him from giving considerable time to public activities. He headed the Forum of Free Enterprise for several years. He founded the Jayaprakash Narayan Institute for Human Freedoms in tribute to JP's leadership in regaining freedom for India in 1977, and donated to it the entire profits from the sales of his income-tax book. Member of the First and Second Law Commissions, Palkhivala also served on the Senate of Bombay University, the Blood Banks Association and many public charitable Trusts. Closely associated with the Bharatiya Vidya Bhavan for more than half a century, he became its Vice President. In keeping with the Vedic dictum of offering 10 per cent of one's income for public welfare, he offered this percentage of his yearly net income for the Sadachar Bharati work of the Bhavan. And sent the cheque meticulously, year after year, on March 31. At the request of the Paramacharya Sri Chandrasekhara Saraswathi, he headed the Veda Rakshana Nidhi Trust. I am told that, even when in ill health and unable to participate, he agreed to the meetings being held in his house so that the other members could have the benefit of his

presence. His munificence to Chennai's Sankara Netralaya runs into eight digit figures.

Above and beyond this impressive record of public service, passionate advocacy of constitutional public causes and prolific authorship are his qualities as a human being. All who came in touch with him seem to have been struck by this facet of his being a good human being, possessed of humility and patience and respect for the other, who ever he may be. His deep concern for people, especially the poor, revealed itself in countless acts of compassion and kindness.

Justice Kuldeep Singh of the Supreme Court, in his characteristic way, seems to have caught the essence of the man when he said, "I have heard Nani, watched him, known him and befriended him for the last five decades. I have seen him working in the fields of law, education, economy and finance, and in every field he has excelled to the hilt. But what impresses me the most is his disposition — how he behaves to people, how he talks with them, how honest he is and what a good heart he has. One feels that he is not a man of this world but someone from outside. I have many times tried to explain him as a man. But it is very difficult. One can only feel his essence and enjoy him, as one enjoys the fragrance of a flower or the smile of a child".

*The writer is a Senior Advocate, Madras High Court. This tribute appeared in The Hindu dated December 22, 2002, and is reproduced with the kind permission of the author and The Hindu.*

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# The Constitution of India

Soli Sorabjee

March 22, 2003

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On January 16, 1920, was born a child in Bombay christened Nanabhoy by his parents. It was not an earth-shattering event at the time. In later years, he was known as Nani Palkhivala — a household name, not only amongst lawyers, but across the length and breadth of our country. What was the constitution of this man who became an authority on and guardian of our Constitution in later years? What was his background? Physically he was not impressive. A young, slim boy measuring about 5 feet 7 inches in height and not having many kilos to carry. Nani Palkhivala was not born with a silver spoon in his mouth. He hailed from a humble, Parsi, middle-class working family. His ancestors were in the profession of making and fixing ‘palkhis,’ namely, palanquins, to be fitted to horse carriages of those times. Hence the surname Palkhivala which, like many Parsi surnames, is associated with a particular calling or profession.

Nani Palkhivala’s schooling was in Master’s Tutorial High School in Bombay. He was a brilliant student and did extremely well despite his initial handicap of stammering which he overcame by

sheer willpower. After matriculation he joined St. Xavier's College, Bombay, and completed his MA in English Literature. In his younger days, he did take to music and played the violin reasonably well. But the spell of Apollo was short-lived. Music was not one of his passions in later life.

Palkhivala applied for a lecturer's post at Bombay University. To his surprise and regret, a Parsi girl was appointed to the post. With admission to most other courses closed, he enrolled at the Government Law College, Bombay. This is one instance of how destiny plays a role in one's life. Had Palkhivala got the lecturer's post, we would have had a brilliant professor, but the world of law and public life would have been the loser. Nani was eternally grateful to the young lady professor and treated her to dinner for several years.

Nani had the good fortune of joining the chambers of the legendary Sir Jamshedji Kanga in Bombay in 1944. He had no godfathers in the profession. His rise at the bar was meteoric. Within a couple of years of joining the profession, he was briefed in every important matter in the High Court. He was the darling of the young members of the bar who would throng the court to listen to his arguments.

The first case of constitutional significance in which he appeared in the Bombay High Court was *Fram Nusserwanji Balasara v. State of Bombay* in which various provisions of the Bombay Prohibition Act were challenged. He was the junior-most counsel in the case, which was argued by Sir Noshirwan Engineer. Some students of the Government Law College, Bombay and I had bunked our classes and gone to the High Court to witness the proceedings. I distinctly remember Nani sitting at the end of the row and passing on written chits to the other counsel in the case who, along with Sir Engineer, were G. N. Joshi and R. J. Kolah.

It was not long before Palkhivala started arguing cases himself. The validity of the Administration of Evacuee Property Act and the

Bombay Land Requisition Act were challenged. Nani was in the forefront of the legal challenges to these Acts which, however, were repelled by the Bombay High Court. Those familiar with the legal profession know that a lawyer often makes his mark not only by the cases he wins, but by the quality of his performance in cases where the ultimate result is not favourable. *Abdul Majid* and *Heman Alreja* were two such cases in which Nani distinguished himself in 1950-51.

Another important case, which Nani argued, was the famous RMDC case, which involved the question of whether solution of a crossword puzzle in question depended on the exercise of skill or whether it was a lottery and chance predominated.

A case of constitutional significance, which Palkhivala argued in 1954 and won before the Bombay High Court, was the one concerning the interpretation of Article 29(2) and Article 30 of the Constitution. It related to the right of Anglo-Indian schools regarding admission of students in schools teaching through the medium of English. The impugned circular issued by the State of Bombay was struck down by a Division Bench of the Bombay High Court presided over by that great Chief Justice, M.C. Chagla. Chagla was Nani's most favourite judge. He considered Chagla a great judge whose burning desire was to do real justice and whose judgements, in Nani's words, "had no dark nooks or misty crannies". The State of Bombay carried the matter to the Supreme Court, which upheld the judgment of the Bombay High Court and ruled that the impugned circular violated the fundamental right guaranteed under Article 29(2) of the Constitution. Nani argued the case brilliantly before the Supreme Court. He was hardly ten years at the bar.

Despite his busy practice, Nani devoted time to teaching law to students and was a part-time lecturer at Government Law College, Bombay. He endeared himself to students by his clear exposition of the subject always with a dash of humour and wit. (At that time he was lecturing on the Evidence Act.) His was one

class that I and other students did not bunk. Indeed, we all wished that his lecture would go on beyond the allotted time. Justice [Y.V.] Chandrachud, who was also a part-time lecturer, has written in his piece in a Marathi daily that he and Nani shared a horse-driven Victoria to reach the college since they could not afford a taxi.

Nani's contribution to the development of our constitutional jurisprudence commenced with his appearances in the Supreme Court in cases involving interpretation of the Constitution. In *Bhanji Munji*, the validity of the Bombay Land Requisition Act was challenged. The Supreme Court applied the Gopalan doctrine, namely, that the freedoms relating to a person or a citizen guaranteed by Article 19 assume the existence of a free citizen and can no longer be enjoyed if a citizen were deprived of his liberty by the law of preventive or punitive detention. Consequently, the court ruled that when there is a substantially total deprivation of property which is already held and enjoyed, Article 19(1)(f) is excluded and is not applicable. One must then turn to Article 31 and see how far that is justified. Despite Palkhivala's forceful advocacy, the Supreme Court refused to test the validity of the Bombay Land Requisition Act on the touchstone of Article 19(1)(f). That was in 1954.

Later, in February 1970, in the bank nationalization case, this legal heresy which had a restrictive, indeed a pernicious effect on the development of constitutional law, was given a long-awaited burial. The court held that Article 19(1)(f) and Article 31(2) were not mutually exclusive.

This, to my mind was Palkhivala's signal contribution to the development of our Constitution by persuading the Supreme Court to remove the distortions that had crept in because of the earlier judgments. The irony is that *Gopalan*, a case relating to the personal liberty of a communist leader, was overruled in a case relating to property rights in the context of bank nationalization.

The *Privy Purse* case was another of Palkhivala's achievements. He was appalled by the breach of faith by the Government of India

by passing a midnight executive order derecognising the princes. The pledge given to the princes by Sardar Patel in the Constituent Assembly when the privy purse provisions were enacted, was flagrantly dishonoured. He felt that the action of the government, apart from being unconstitutional, was in breach of constitutional morality. He firmly believed that:

“The survival of our democracy and the unity and integrity of the nation depend upon the realisation that constitutional morality is no less essential than constitutional legality. Dharma (righteousness; sense of public duty or virtue) lives in the hearts of public men; when it dies there, no Constitution, no law, no amendment, can save it.”

Freedom of expression and freedom of the press are the cornerstones of democracy, the Ark of the Covenant of our Constitution. A disingenuous attempt was made to stifle press freedom through the machinery of the import control regulations by imposing severe restrictions on the import of newsprint. Bennett Coleman, amongst other newspapers, challenged the import control policy. Nani was briefed. I was privileged to be his junior.

Incidentally, Palkhivala was a director of the national daily, *Statesman*, which fact also accounts for his deep attachment to press freedom. Nani's performance was superb. The propositions he enunciated were a model of clarity, marked by elegance of language. Some of them are reflected in the majority judgement of Justice A. N. Ray. For example, the passage: “Newsprint does not stand on the same footing as steel. Steel will yield products of steel. Newsprint will manifest whatever is thought of by man.” It is a pity that counsel's arguments in important cases are not reported in the law reports. The court struck down the restrictions. This judgment is another instance of the generous protection accorded to press freedom by our judiciary.

Rights of the minorities figured prominently in the Constituent Assembly debates. Minority rights are indeed human rights and have been rightly guaranteed as fundamental rights in our Constitution. The minorities attached great importance to the freedom of religion

and the right to establish and administer educational institutions of their choice. They gave up their demand for separate electorates in view of the guarantee of these rights as fundamental rights and their guardianship and protection by the Supreme Court. The fears of the minorities were dispelled, in the words of Rev. Jerome D'Souza, who represented the Indian Christian community, by: "The completeness, the generosity, the thoroughness with which individual rights have been safeguarded in the section of our Constitution devoted to fundamental rights, the way in which these fundamental rights were placed under the power and jurisdiction of the Supreme Judicature and the spirit in which those provisions were passed by this House."

State legislations encroaching upon the right of minority educational institutions became frequent. That led to St Xavier's College challenging the legislation in the Supreme Court. As you may be aware, St Xavier's College was Nani's *alma mater*. It was mine as well. We both appeared in the Supreme Court. We did not charge any fees. The crux of the matter was the autonomy of the educational institutions and what were the limits of governmental interference, especially in the matter of appointment and dismissal of teachers and admission of students of the minority community. There was no dispute that the right to administer did not comprehend the right to maladminister. But where did administration of educational institutions end and maladministration begin? Nani eloquently and movingly expounded the legal position to the nine-judge bench. The majority judgment upholding the right of the minorities is a substantial contribution to our constitutional jurisprudence. It is heartening that the recent eleven-judge bench judgement has not departed from the salutary principles laid down in St Xavier's College case.

No account of Palkhivala would be complete without mention of his magnum opus, *The Law and Practice of Income Tax* [by Kanga and Palkhivala]. It is not customary to cite textbooks of living authors. Palkhivala's treatise on income tax was an exception. Lawyers, judges,

members of the income-tax tribunal and income-tax practitioners regarded the book as their Bible and invariably relied upon it. The work has secured national and international recognition. The first edition of the book was published in 1950, when Palkhivala was about 30 years old. Sir Jamshedji Kanga, whose name appears first in the title of the book, gracefully acknowledged that the credit belonged to Palkhivala.

It seems that there was something in Nani's genes which attracted him to the law of taxation. His talent in expounding the subject was matched by his genius in explaining the intricacies of the budget to thousands of his listeners. His famous Annual Budget speeches had humble beginnings in 1958 in a small hall of an old hotel called Green Hotel in Bombay. He spoke without notes and reeled off facts and figures from memory for over an hour, keeping his audience in rapt attention.

The audience in these meetings was drawn from industrialists, lawyers, businessmen and common individuals. Nani's speeches were fascinating for their brevity and clarity. His budget speeches became so popular throughout India and the audience for them grew so large, that bigger halls and later the Brabourne Stadium in Bombay had to be booked to keep pace with the demand of an audience of over 20,000. It was aptly said that in those days that there were two budget speeches, one by the Finance Minister and the other by Nani Palkhivala, and Palkhivala's speech was undoubtedly the more popular and sought after. It was a phenomenon, which could come only from a genius in the art of communicating.

Palkhivala had deep respect, indeed reverence, for the Constitution. He realized the importance of preserving the cardinal values of the Constitution, its basic and essential features. His favourite quotation was the statement of Joseph Story, the great American jurist, who said: "The Constitution has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly, or corruption, or negligence of its only keepers, The People."

As you may be aware, these words of Story were quoted by Sachchidananda Sinha in his inaugural address, as Provisional Chairman, to the Constituent Assembly on 9-12-1946. Palkhivala believed that a Constitution is intended not merely to provide for the exigencies of the moment, but to endure over the ages. He urged that we should get accustomed to a spacious view of the great instrument because, “the Constitution was meant to impart such a momentum to the living spirit of the rule of law that democracy and civil liberty may survive in India beyond our own times and in the days when our place will know us no more”. He pointed out that our original Constitution provided for stability without stagnation and growth without destruction of human values. He lamented that the recent amendments had only achieved stagnation without stability and destruction of human values without growth. Palkhivala did not at all believe that a Constitution is unamendable or cannot be changed. He shared the thinking of Thomas Jefferson, who said: “Some men look at constitutions with sanctimonious reverence and deem them like the Ark of the Covenant too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human and suppose what they did, be beyond amendment... I am certainly not an advocate for frequent and untried changes in laws and constitution... but I know that the laws and institutions must go hand in hand with the progress of human mind... As new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also and keep pace with the times.”

Palkhivala appreciated the wise words of Pandit Jawaharlal Nehru who expressed the same thought in felicitous language. “A Constitution which is unchanging and static, it does not matter how good it is, how perfect it is, is a Constitution that has passed its use. It is in its old age already and gradually approaching its death. A Constitution to be living must be growing; must be adaptable; must be flexible; must be changeable... as society changes, as conditions change, we amend it in the proper way.”

What outraged Palkhivala was the tinkering with the Constitution by politicians, its frequent amendment as if it were a Municipal Licensing Act or the Drugs Act, the failure to preserve the integrity of our Constitution against many hasty and ill-considered changes, the fruits of passion and ignorance. His firm belief was that Parliament's amending power is not absolute, the amending power is subject to inherent and implied limitations, which do not permit Parliament to destroy any of the essential features of the Constitution and thereby, damage the basic structure of the Constitution.

The zenith of Palkhivala's fame and forensic success was in persuading the Supreme Court to accept the basic structure doctrine which it did by a majority in the *Keshavananda Bharati* case. I vividly remember the early morning conferences the two of us had those days in his room at Oberoi Hotel. Both of us were in our pyjamas. At one such conference, I nervously suggested the argument about inherent limitations on the amending power based on certain articles which I had read in the US law journals. He grasped the point, but was not quite convinced. A few hours later in the Supreme Court, he expounded the doctrine brilliantly. The labour and efforts which were put in the case were tremendous. The range of our research was far and wide. I remember the volumes of the Constituent Assembly Debates which I went through in order to prepare a 'short note' for Nani. He did not like long and verbose submissions. To my mind *Keshavananda Bharati* was Palkhivala's greatest contribution to our constitutional jurisprudence. The judgment has been a salutary check on Parliament's tendency to ride roughshod over fundamental rights and its insatiable appetite to encroach upon fundamental rights. You may be interested to know that the Bangladesh Supreme Court has followed the Supreme Court judgment in *Keshavananda Bharati* and struck down a constitutional amendment.

Nani, however, was at his forensic best in his arguments before the bench which was specially constituted to reconsider *Keshavananda*

*Bharati*. In the words of one of the judges on the bench, “The heights of eloquence to which Palkhivala had risen have seldom been equalled and never been surpassed in the history of the Supreme Court.”

The decision of the Supreme Court in *Minerva Mills* was another of Nani’s triumphant efforts to prevent the defacement and defilement of our Constitution. His unsurpassable advocacy in the case led the Supreme Court to declare that clause (4) of Article 368 of the Constitution which excludes judicial review of constitutional amendments was unconstitutional.

Nani’s intimate knowledge of taxation law and mastery of constitutional principles were at play in the challenge to the validity of the Expenditure Tax Act. This was one of Nani’s masterly but unsuccessful performances. Will the Supreme Court have time to repent its judgment in *Federation of Hotel and Restaurant*? Only time can tell.

Palkhivala’s forensic skills and ability were not confined to taxation and the Constitution. His knowledge of economics and industrial law and labour legislation were in full display in the case of *Premier Automobiles*, which dealt with the issue of fixation of prices for automobiles and also in the case of *Jalan Trading* in which the constitutionality of the Payment of Bonus Act was assailed.

Palkhivala’s range of legal practice is also evident by his appearance and advocacy in *Seshammal v. State of T.N.* which involved the right of archakas in temples. In that case, Palkhivala expounded the rights which flow from the appointment of a priest or an archaka to perform religious functions, and the impact and implication of that appointment in relation to the freedom of religion guaranteed by Articles 25 and 26 of the Constitution.

Palkhivala’s forensic achievements were not confined to courts in our country. He represented India in three cases in the international fora. First, before the Special Tribunal in Geneva appointed by the UN to adjudicate upon Pakistan’s claim to enclaves in Kutch. Another was

before the International Civil Aviation Organisation at Montreal and later, in appeal before the World Court at The Hague when Pakistan claimed the right to fly over India.

There have been lawyers who matched Palkhivala in erudition and legal knowledge. But for sheer advocacy Palkhivala was unsurpassable. Clarity of thought coupled with precision and elegance of expression, impassioned plea for the cause he espoused in the case, excellent court craft and an extraordinary ability to think on his legs rendered him an irresistible force and made him *sui generis*.

Another instance of destiny playing a part in Palkhivala's life and career is the offer of the office of the Attorney-General to him. He recounts the incident in his book, *We the Nation*. It is worth reproducing *in extenso*: "In 1968, Mr Govinda Menon was the Law Minister in the Congress Government. He pressed me hard to accept the office of the Attorney-General for India. After a great deal of hesitation I agreed. When I was in Delhi I conveyed my acceptance to him, and he told me that the announcement would be made the next day. I was happy that the agonising hours of indecision were over. Sound sleep is one of the blessings I have always enjoyed. That night I went to bed and looked forward to my usual quota of deep slumber. But suddenly and inexplicably, I became wide awake at three o'clock in the morning with the clear conviction, floating like a hook through my consciousness, that my decision was erroneous and that I should reverse it before it was too late. Early in the morning, I profusely apologised to the Law Minister for changing my mind. In the years immediately following, it was my privilege to argue on behalf of the citizen, under the same Congress Government, the major cases which have shaped and moulded the constitutional law of India — Bank Nationalisation (1969), Privy Purse (1970), Fundamental Rights (1972-73), among others."

Palkhivala was offered judgeship of the Supreme Court in the early sixties which he declined, possibly for the same reasons which made him decline the office of the Attorney-General for India. I wish

destiny or some other force would have made Nani decline the office of directorship in the House of Tatas. He gave a lot of his time and energy to that excellent business house which he could have devoted to the legal profession and its improvement, and the reform of the legal system.

Palkhivala has received recognition from renowned academics. In the book, *Working a Democratic Constitution* by the eminent Granville Austin, reference to Palkhivala occurs at sixteen pages. Palkhivala has received citations and honorary degrees of Doctor of Laws from various universities such as Princeton University, New Jersey, and Lawrence University, Wisconsin, Annamalai University, Tamil Nadu, and the University of Mumbai.

The citation he received from Princeton University is worth reproducing as it epitomises Nani's basic qualities: "Defender of constitutional liberties, champion of human rights, he has courageously advanced his conviction that expediency in the name of progress, at the cost of freedom, is no progress at all, but retrogression. Lawyer, teacher, author, and economic developer, he brings to us as Ambassador of India intelligence, good humour, experience, and vision for international understanding..."

All these attainments to which I have referred testify to Palkhivala's brilliance, his eminence, his versatility, his phenomenal memory. But the quality of greatness which we rightly attribute to him lay in his basic human qualities. The foremost was his willingness to help persons in need without any show or publicity. Let me recount one instance. Dr S. S. Badrinath of the famous Sankara Nethralaya Hospital in Chennai, was invited for dinner at his home by Nani. After the dinner was over, Nani escorted the doctor to his car and gave him a small envelope saying this was a token contribution for the hospital. When Dr Badrinath later opened the envelope, he found in it Nani's personal cheque for ₹ two crore. A token contribution indeed!

Let me recount another instance as a tribute to Jayaprakash Narayan, who played an outstanding role in regaining freedom for India after the nightmare of the Emergency; Palkhivala founded the Jayaprakash Institute of Human Freedoms. The purpose of the institute is to strengthen the roots of Indian democracy and to carry on the epoch-making work of that great patriot. A sum of ₹ 5,37,000 representing the entire profit from Palkhivala's Seventh edition of *The Law and Practice of Income Tax* was donated to this institute.

Palkhivala was of the firm view that some minimum qualifications should be prescribed for those who seek election to Parliament. His point was that you need years of training to attend to a boiler or to mind a machine, to supervise a shop-floor or to build a bridge, to argue a case in a court of law or to operate upon a human body. But he was shocked that to steer the lives and destinies of millions of our fellow-men, there is no requirement of any education or equipment at all. His favourite quote was Dr Rajendra Prasad's observation in the Constituent Assembly: "I would have liked to have some qualification laid down for members of the legislatures. It is anomalous that we should insist upon high qualifications for those who administer or help in administering the law, but none for those who make it except that they are elected."

He frequently pointed out that it is open to the Prime Minister to select a minority of the ministers from outside. And the advantage of such a system is that it enables the Prime Minister to have in his cabinet some of the best talent available in the country. He endorsed Shri Aurobindo's belief that "The State fails in its duties if the ruling class did not represent the best minds of the nation."

Palkhivala was not attracted by the rituals and the pomp and ceremonies of religion. He believed in and practised the essence of Zoroastrian religion to which he belonged, namely, 'Humata, Hukhata, Huvarashta' — good words, good thoughts, good deeds. Shri Aurobindo was his favourite writer and thinker whose writings greatly attracted him. Palkhivala embodied the concept of plain living

and high thinking. Success did not go to his head. Fame and fortune did not increase the hat size of the legendary Nani Palkhivala. There was never a trace of arrogance or conceit or pomposity in him.

Another outstanding human quality about Nani was that jealousy, or rather envy, the besetting sin, which cannot countenance the fame and success of others, never consumed him. A holier-than-thou attitude was alien to him. He was not one to smile and shake your hand and thereafter stab you in the back. Backbiting and denigration of others was unknown to him. Humility and natural modesty were his hallmarks. He had no ego problems. The warmth of his friendship extended to all fellow human beings, whatever their status in life. He was tender towards the bashful, gentle towards the distant and merciful towards the absurd. Thus, Nani fulfilled Cardinal Newman's definition of a true gentleman. Of Nani, it can be truly said that he walked with kings yet lost not the common touch.

The greatness of Palkhivala truly lay in his sincerity and commitment to spiritual values which made him a moral force in our public life. The fearlessness with which he spoke out, whichever be the party in power, made him the voice of conscience of the nation. And conscience for Nani was not an alibi but an ally, a constant anchor of his beliefs and actions. He kept the faith and held high the banner of freedom and the rule of law. He fully shared the belief of Justice Frankfurter that "Democracy is always a beckoning goal, not a safe harbour. For freedom is an unremitting endeavour, never a final achievement."

Regrettably, we live in times when there are no men and women to match our Himalayan peaks, when there is a crisis of moral leadership, when our political system and public life have more hypocrites, wheeler-dealers, schemers and cowards than at any time in our history. Nani was one constant shining star in the dark firmament. His passing away is indeed a real loss to the nation. As I survey the current scene in our public and private life, I am impelled to say: Nani, thou should have been living at this hour.

Of late, Palkhivala was deeply upset, indeed depressed, at the catastrophic decline in values in our public life. The onslaught of materialism and its effect on our youth bothered him very much. He was anguished at the deterioration which had set in, in our institutions. He felt that corruption, which in some cases had not spared the judiciary whose independence he had staunchly defended, was illustrative of the incredible debasement of our national character.

He lamented that the “Bar is more commercialised than ever before. Today the law is looked upon not as a learned profession but as a lucrative one.” He stressed the need to educate our lawyers better and not to produce “unethical illiterates in our law colleges, who have no notion of what public good is”. He feared that our country was on a long slide towards darkness and obscurantism with no visible solution and sign of hope. His mission was to launch a movement for the regeneration of values and to maintain and revive idealism in the youth of our country.

Palkhivala was ailing for a long time. It was painful to see that a person, so eloquent and articulate, was unable to speak or recognize persons except occasionally in a momentary flash. He answered the Inevitable Summons from his Maker on 11-12-2002. The earth received an honoured guest as Palkhivala was laid to rest.

I had known him for 50 years. My first professional association with him was in a matter relating to the Bombay Land Revenue Act in the Bombay High Court. It was an exhilarating experience. His conferences were short and to the point. He appreciated the inputs and research of juniors briefed with him. He treated them with kind consideration and encouraged them. When he was arguing and was on his legs and there was some point or decision I wanted to bring to his attention, it would be by passing a brief note. He would look at it and assimilate it in a few seconds.

I was frequently his guest at his lunches and dinners at home which were marked by complete informality and warm hospitality.

In his home in Bombay or in the embassy at Washington, he was a wonderful host who had his eyes on all his guests. He and his wife Nergesh, a noble lady who predeceased him, were my guests at my hill-station bungalow at Mahabaleshwar. Alas, because of constraints of time, Nani's inveterate enemy, the duration was just two days.

I am loathe to lend books, because they are seldom returned. The book which I treasure the most are two of Nani's books which bear the generous inscription:

“For dearest Soli, Who has done so much to uphold the sanctity of the Constitution, Nani, 4-12-1974.”

He was my role model in the profession and a true and dear friend with whom I shared many wonderful times and rich and stimulating experiences. For me, his passing away is a deep personal loss. It has left a void which will be very difficult to fill.

Rajagopalachari rightly said of Palkhivala, “He is God's gift to us.” Nani Palkhivala's passing away has indeed left a dent in Indian humanity. Born of the sun he travelled a while towards the sun, and left the vivid air signed with his honour.

Yes friends, Palkhivala has departed from our midst. But he can never leave us, leave our minds and hearts where he is firmly enthroned. And it behoves us all to carry forward the Palkhivala legacy of truth, goodness and beauty, deriving inspiration from his thoughts, his deeds and the many-splendoured life of this Man for All Seasons, the great Nani Palkhivala.

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# **The Judicial System: The Need for Urgent Reform and Uniform Civil Code**

**Ram Jethmalani**

September 6, 2003

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In the death of Nanabhoy 'Nani' Palkhivala, we lost a titan of the legal profession, a captain of industry, a master of political economy and a spiritually evolved human being. I came in close contact with him in the seventies after the infamous supersession of judges by Mrs Indira Gandhi. [In 1973, the Chief Justice of India, A.N. Ray, was given the post, superseding three other judges.] Nani fully accepted the teaching of former U.S. President Woodrow Wilson that "the history of liberty is a history of curtailment of government power, not the increase of it". Nani inspired all those who were determined to save the judges of India from ministerial arrogance and power.

I selected Nani as my counsel when Mrs Gandhi's government decided to detain me without trial under the hated MISA (Maintenance of Internal Security Act) for a speech I delivered attacking the phony emergency that disfigured and destroyed Indian democracy in 1975. Nani got an injunction from the Bombay High Court restraining execution of the warrant for my arrest issued by the District Magistrate of Palghat, [that town] being the scene of my 'treasonable' activity.

The injunction was in force on the date of the infamous Jabalpur Judgment and it helped me to leave India and obtain political asylum in the United States. [The controversial judgment – ADM Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207 – held that under the Emergency, no one could approach the court to save oneself from the state’s authority to take away liberty or life.]

I discovered [the economist in him] only when I attended one of his lectures on the budget at the Brabourne Stadium. He was merciless in his attack, and his mastery of facts and figures was astounding. That was the time Nehru-Mahalanobis economics controlled successive budgets year after year. I believe Nani echoed the Victorian-era political theorist and philosopher Herbert Spencer who, in ‘The Coming Slavery’, wrote: “There is that increasing need for administrative compulsion and restraints which results from the unforeseen evils and shortcomings or preceding compulsions and restraints. Moreover, every additional state interference strengthens the tacit assurance that it is the duty of the state to deal with all evils and secure all benefits. Increasing power of a growing organization is accompanied by decreasing power of the rest of the society to resist its further growth and control. The multiplication of careers opened by a developing bureaucracy tempts members of the classes regulated by it to favour its extension, as adding to the chances of safe and respectable places for their relatives. The people at large, led to look on benefits received through public agencies as *gratis* benefits, have their hopes continually excited by the prospects of more. A spreading education, furthering the diffusion of pleasing errors rather than of stern truths, renders such hopes both stronger and more general. Worse still, such hopes are ministered to by candidates for public choice, to augment their chances of success, and leading statesman, in pursuit of party ends, bid for popular favour by countenancing them. Getting repeated justifications from new laws harmonizing with their doctrines, political enthusiasts and unwise philanthropists push their agitations with growing confidence and success. Journalism, ever responsive to

popular opinion, daily strengthens it by giving it voice; while counter-opinion, more and more discouraged, finds little utterance.”

I regard Nani as the Joseph Schumpeter of India, a Harvard Business School professor who was of the view that the essence of capitalism is the process of ‘creative destruction’ – the perpetual cycle of destroying the old and less efficient ones. Those countries that are most willing to let capitalism quickly destroy inefficient companies so that money can be freed up and directed to more innovative ones, will thrive in the modern era. Those who rely on their governments to protect them from such creative destruction will fall behind in the modern age. I wish Indian economists who have mortgaged their intellect to the communist manifesto and the Avadi Resolution had listened to Nani. [Nehru got Parliament to accept the ‘socialist pattern’ of economic development at the Avadi session of the Indian National Congress in 1955.] India’s poor would have been much better off by now. Schumpeter would have recognized in Nani a pioneering industrialist and entrepreneur.

Nani’s greatest contribution in the field of Constitution Law was his glorious success in the Keshavananda Bharati case. Nani had realized that the Constitution had been treated with less respect than is due to The Cattle Trespass Act. He brought in his complete legal expertise and repertoire to sustain a unique proposition. Whatever be the width of the amending power in a Constitution you cannot by any kind of majority vote later on destroy its basic structure and framework. The government of the day made an inglorious attempt to have the Keshavananda judgment reviewed and reversed. Fortunately, the judges did not accept the invitation. The doctrine of basic structure is now an incontrovertible part of our constitutional jurisprudence.

The 1990s were a watershed in Nani’s attitude to the justice system in the country. The government expressly proclaimed that it wanted committed judges, committed to the ideology of the ruling party. Writing in *The Times of India* of July 9, 1990, Nani declared: “The slide on the inclined plane has been rapid and unmistakable. In the

first two decades of our republic it was the compulsion of veracity, not the fear of the law relating to Contempt of Courts Act. The Lawyers' Associations of Bombay passed a resolution last month virtually charging some judges of the High Court with corruption – a move unprecedented in the history of any modern democracy. For the lawyers, it was a cry of despair. Collectively they could do with practical impunity what, if done individually, would have amounted to criminal contempt of court. ... The issue affects not merely lawyers and litigants but the entire nation. All citizens are vitally interested in an unpolluted stream of justice. ... If you lose faith in politicians, you can change them. If you lose faith in judges, you still have to live with them. The ineluctable fact is that the conduct of some judicial officers in different courts has been far from exemplary in terms of ethics. ... Corruption in the upper reaches of the judiciary is illustrative of the incredible debasement of our national character.”

In the same article Nani deplored the cumbersomeness of the impeachment procedure and more or less approved of the creation of a National Judicial Commission proposed in the Constitution 67<sup>th</sup> Amendment Bill of 1990. The impeachment proceedings of 1993 in the Lok Sabha fully justified Palkhivala's comments. It is strange that no National Judicial Commission has come into existence till date. The reasons are not far to seek: first, because the judges do not want it, and second, because the ruling parties have had no interest in disgorging their share of patronage, big or small. It will be dishonest to assert that public confidence in the administration of justice has so improved that people have lost interest in the creation of one.

The National Commission to review the working of the Constitution headed by former CJI M.N. Venkatachaliah examined this in great detail. Though it concluded that the Indian judiciary has produced some extraordinary judges known for their learning, integrity and devotion to law, it also recorded that there have been exceptions and in recent years more and more such exceptions are coming to light. There has been public concern over judges not observing working hours, being away from court without seeking leave and dubious

delays in delivering judgments and conducting themselves in an ‘un’-judge-like manner.

The bitter truth is that today one has to search strenuously for judges who on their retirement will justly deserve the comments made in *The New York Times* upon Justice Felix Frankfurter’s retirement from the US Supreme Court. In its editorial it said, “History will find greatness in Felix Frankfurter as a justice not because of the results he reached but because of his attitude towards the process of decision. His guiding lights were detachment, rigorous integrity in dealing with facts of the case, refusal to resort to unworthy means no matter how noble the end, and dedication to the court as an institution.”

The Commission tried to demarcate the areas of proven misbehaviour warranting removal from office and deviant behaviour calling for less drastic punishment. It has recommended that a committee comprising the Chief Justice of India and four of the seniormost judges of the Supreme Court examine complaints. However, all the conclusions reached by the Commission are declared to be tentative as the commission itself wants to be instructed by public opinion.

The response of the government of the day was the Constitution 98<sup>th</sup> Amendment Bill 2003 introduced in the Rajya Sabha. The bill is a reflection of the wooden-headedness of all governments. The first flaw is in the constitution of the proposed commission. Public opinion has always been that more often than not deep political controversies end up in our higher courts, particularly the Supreme Court, in the garb of legal and constitutional disputes. The Prime Minister of today might well become the leader of the Opposition after a short time and vice versa. It is therefore fit and proper that the Commission represent both the ruling Government and the Opposition. The leader of the Opposition or his nominee should be a member of the Commission.

The need for a judicial commission has arisen because both the methods of appointment tried so far have failed. The earlier one, which was in existence for more than 40 years, provided for consultation between the judiciary and the executive, but the overriding paramountcy was

to itself. Paramountcy has to be relocated in a new body that inspires confidence in its competence and integrity.

Two other vital groups that must be represented on the commission are the organized bar and the academic fraternity. Who knows better the character and competence of a colleague aspiring for judicial office than his colleagues in the profession? They are the best barometers of his learning, integrity and public department.

The American Bar Association exercises tremendous power though it is non-statutory in the matter of selection of judges. Of course, it means that the bar has to raise high standards of excellence and its leaders are able to eschew all self-interest in the matter of appointments. No judge disliked by the bar can effectively administer justice in his court.

It is today acknowledged that legal scholarship is no longer to be found on the bench. It is rare to find a judge who can unhesitatingly claim to be a jurist. Judgments produced both at the High Court and the Supreme Court level are mostly unreadable because of their bad prose, lack of style and literacy embellishment, and absence of depth of learning and subtlety of thought. It is imperative to scout for these qualities in potential aspirants and appointees.

Most judges in England are selected from amongst practising lawyers. The Lord Chancellor advises the Prime Minister who in turn advises the Crown on the appointment of Law Lords, Heads of Divisions and Lord Justices of Appeal and he virtually makes all other judicial appointments. The Lord Chancellor has a team of officers who gather information; the system is fair and is one in which the public has confidence. In December 1999, Sir Leonard Peach made a number of recommendations in his report on the judicial appointments process. Partially acting on this the Lord Chancellor has created a commission for judicial appointments that provides, for the first time, an independent mechanism for those who aspire for judicial office but whose candidacy has escaped the attention of the Lord Chancellor. In March 2001, Professor Sir Colin Campbell, Vice-Chancellor of Nottingham University, was appointed First Commissioner for

Judicial Appointments. Seven deputy commissioners were appointed in December 2001, of whom one is also Commissioner for Judicial Appointments for Northern Ireland. The commission's role is to conduct an ongoing audit into the procedures for the appointment of judges. It is matter of significance that a university don heads the commission.

Apart from the deficiencies in its constitution, there is also the deficiency of power. The procedure of removal by impeachment is left intact. There is no check or control over the transfer of judges. The whole area of judicial misconduct, falling short of that which calls for removal, remains untouched. The bill has only one merit. A law minister who may not be much of a lawyer or not a lawyer at all retains his patronage undiminished.

It is well to recall that even in the Gupta case of 1982 [*S.P. Gupta v. UOI*; 2 SCR 365, AIR 1982 SC 149] in which the Supreme Court threw judicial independence to the winds and ruled in favour of executive paramountcy, Justice P.N. Bhagwati was constrained to admit to the need for change which he recommended in the following words: "We would rather suggest that there must be a collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be broader 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."

The current public disappointment with the judiciary in general and its higher echelons in particular raise two questions of public importance: (1) Should the rottenness in the judiciary structure and the termites which cause it be exposed? and (2) Does the law of contempt as currently understood require repeal or modification?

On the first of these there are two conflicting views. The first is that some invisible in-house procedure for repair and rectification should exist within the judicial family and the misbehavior of judges should not be publicly exposed. If criticism of judges becomes a regular routine, courts will be stripped of their dignity, solemnity and capacity to inspire fear. This will lead to the collapse of the judicial system. Doubtless this argument must be given due weight. The people of this country have for long accepted this limitation on their freedom of conscience and free speech. There is also the lurking fear of the contempt power of judges descending on the head of the critic. Unfortunately the hope that in the long run things will somehow work out well has not materialized and as observed by the Venkatachaliah Commission, cases of judicial misbehavior are becoming more and more common.

Prof. Harold Laski, the political theorist and economist, advised us that the manner in which the nation dispenses justice in the courts, the way in which courts discharge their functions, and the methods by which they are chosen are problems that lie at the heart of political philosophy. When we know how a nation doles out justice we know with some exactness the moral character to which it can pretend. To this I must add that a vibrant democracy must extend the application of the rule of accountability to all its branches. Judge Jerome Frank, in his well-known book *Courts on Trial*, struck a conclusive blow for free exposure when he said: "It can ever be unwise to acquaint the public with the truth about the workings of any branch of government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of man-made institutions. The best way to bring about the elimination of those shortcomings of our

judicial system that are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts.”

Justice V.R. Krishna Iyer, in his inimitable style, has told us: “To wash institutions in the acid of truth is the way to remove the dross of lies. ‘Know ye the truth and the truth shall make you free.’ To suppress critical expression beyond minimal reticence parameters is to summon severe explosion of popular rage beyond the ineffectual power of contempt.” He too has expressed the wish that “before long a National Commission beyond the incestuous composition of and interaction among judges themselves, is the desideratum. Statesmanship summons high-level participation in such a performance commission. The way in which ‘Judge and Co.’ (philosopher and social reformer Jeremy Bentham’s phrase for the judiciary) is run is a matter of public interest and national security”.

Throughout my professional career I have fought for judicial independence and integrity. That public confidence has not completely eroded is a tribute to this institution. But I will be less than honest if some truths are not politely uttered. Two judgments delivered in July have left me in a state of mental turmoil. In the first, a well-reasoned and sober judgment of a single judge of the High Court of Delhi was reversed [*UOI v. Prakash P. Hinduja*; Appeal (Crl) 666/2002]. The Supreme Court while reversing it pronounced the High Court judgment to be confusing and contradictory. It would doubtless be a black mark against the poor High Court judge if he ever comes to be considered for promotion to the Supreme Court. But the unpardonable error of the Supreme Court is that in each of those paragraphs in which the Supreme Court discovered the High Court’s findings, there were in fact no findings but only a recital of the arguments of the Solicitor-General which the High Court ultimately rejected. The bar had made no such argument and the Supreme Court cannot even plead that bad advocacy led it to this serious lapse.

The bar had even provided written submissions. It was a reserved judgment and not an oral judgment. How two Supreme Court judges could be guilty of such culpable misreading of the record is beyond comprehension. True, a review petition is pending, in which it has been pointed out on behalf of the petitioners that the Supreme Court owes an apology to the High Court judge. But the secret chamber hearing is not likely to bring justice either to the party or to the High Court. This obviously is not the kind of misbehaviour that attracts an impeachment procedure but it is certainly conduct which brings justice into disrepute and lowers the dignity of the Supreme Court.

In another instance, the Supreme Court reserved a Bombay High Court judgment which rightly held that a management order which grounds air hostesses when they cross the age of 50, consider them as cabin crew up to the age of 58 [*Air India v. Nargesh Meerza*; 1981 AIR 1829, 1982 SCR (1) 438]. When the poor women fly they get about ₹ 80,000 a month and when they work on the ground they hardly get about one-fourth that amount. How can we reconcile ourselves to this kind of male chauvinism? The United Nations tells us to remove all forms of discrimination against women and Article 51A of the Constitution outlaws all practices derogatory to women. Women will not look agile and pretty at 50 but nobody is supposed to complain about the sloppy attire, bulging bellies and foul odour of males over 50.

Judges are made to sit on benches before which all sorts of matters turn up. Some of them arise in areas of law about which one or more or all the judges on the bench have not the faintest idea. I have had the misfortune of appearing before benches in serious criminal cases where not one of the judges could claim familiarity with criminal law. Counsel even find it difficult to decide how much enunciation of the relevant law they must attempt or when to stop in the belief that their argument has at last been understood. It is easy to deal with a loquacious judge but the ignorant usually adopt a sphinx-like posture. Repeated suggestions that matters relating to specific

branches of the law be put before judges who are experts in those areas have fallen on deaf ears. Only those sitting in court observe the frequent miscarriages of justice; these go unnoticed by others and do not even evoke a protest.

I should not let this go without some examples. A two-judge bench of the Supreme Court took the view that an accused who had issued a cheque but had subsequently countermanded the honoring of the cheque by prior intimation to the bank, could not commit an offence under Section 138 of the Negotiable Instruments Act. [This refers to two cases: *Electronics Trade & Technology Development Coporation Ltd*; AIR 1996 SC 2339, and *Modi Cements Ltd v. Kuchil Kumar Nandi*; AIR 1998 SC 1057.] This was such a manifestly erroneous view and caused so much heartburn amongst genuine holders of cheques that there was a public outcry. Luckily a larger bench of three judges reversed the earlier view.

Similarly, in Radhe Shyam's case [*Radhe Shyam Singh v. State of UP*; SLP (Crl) No. 339/2002] a three-judge bench held with the laudable motive of removing congestion in the calendar of our criminal courts that if the prosecution evidence was not completed within two or three years from the recording of the plea of not guilty, the prosecution evidence must be closed and the case must proceed to the next stage. Thousands of prosecutions all over the country came to an abrupt end. Again there was a public outcry and the decisions were reviewed and the defective law considerably modified and diluted.

But one of India's ace criminal lawyers had to call a press conference and explain how the judgment was producing copious miscarriage of justice. Ultimately the judgment came to be overruled along with some others only in April 2002 by a seven-judge judgment on two grounds – that the view taken by the judgments was not only inconsistent with the provisions of an earlier Constitution Bench judgment but also amounted to exercise of legislative powers that are beyond the competence of the judiciary. They constitute an unwarranted trespass in territory reserved for the legislature. The lawyer who criticized the

judgments stood vindicated, but I should like to know how many lawyers today take this kind of academic interest in judgments with which they are not directly concerned and have the courage to declare in public that the Supreme Court has gone haywire.

It is quite clear to me that the quality of justice as well as the competence of judges in the Supreme Court and certainly the High Courts deserve to be considerably improved and enhanced. The procedures tried so far have miserably failed. We have to experiment and innovate. We cannot persist with proved failures. A properly constituted National Judicial Commission is the only answer. But even this will make no difference unless the system of making judicial appointments goes through a major transformation.

Prof. Shimon Shetreet, an internationally recognized Israeli scholar, has emphasized a criterion of appointment, commonly called 'fair reflection of society'. In a paper he presented in 1996 he described it thus: "An important duty lies upon the appointing authorities to ensure a balanced composition of the judiciary, ideologically, socially, culturally and the like. This is based on a doctrinal ground that has been suggested, namely, the principle of fair reflection. This doctrinal approach may be supported by additional arguments. The judiciary is a branch of the government, not merely a dispute resolution institution. As such, it cannot be composed in total disregard of the society. Hence, due regard must be given to the consideration of fair reflection." In Indian conditions it means that the process should seek to ensure that all sections of society particularly women, dalits, members of different ethnic groups, are not unfairly under-represented in the judiciary.

This view will doubtless be passionately resisted. Merit alone must be the sole criteria but what is merit and how is it to be assessed and spotted? Fortunately a middle path, the third way, is available.

Indian society is so vast and complex that it may be almost impossible to give representation to every interest but it is certainly possible to

insist that judges, apart from possessing adequate knowledge of law and professional skills, fairly reflect society in the general sense of having cultural sensitivity, gender sensitivity, wisdom in a broad sense and an understanding of the community's aspirations and objectives.

To encourage frank and responsible criticism of judges and their working and to bring about elevation of judicial standards, a twofold change in the current law of contempt is imperatively called for. First, though the Supreme Court as well as the High Courts are by Articles 129 and 215 respectively declared to be the Courts of Record and possessed of all powers of such a court including the power to punish contempt of themselves, this power must be subjected and is in fact subject to all the provisions of the Contempt of Courts Act, 1971. The judgment of the Supreme Court in *Ajay Kumar Pandey* – (1996) 6 SCC 510 – and an earlier one of 1992 taking the same view must be declared as bad law and expressly reversed.

In this case the court delivered the following statement of law: “The jurisdiction of the court under Article 129 of the Constitution is independent to the Contempt of Courts Act and the Power under Article 129 cannot be denuded, restricted or limited by the Contempt of Courts Act, 1971. Thus there is no restriction or limitation on the nature of punishment that this court may award while exercising its contempt jurisdiction. But we do not intend to travel far and beyond.” This observation is as thoughtless as an assumption in *Sukhdeo Singh* – 1954 SC, Page No.186 – that the maximum period of punishment prescribed by the then Contempt of Courts Act would also be applicable to the High Court. Fortunately, the letter, however thoughtless, is good law. The judges intuitively perceived without any argument that parliamentary legislation cannot be ignored and must be binding.

It is true that the constitutional articles recognize the inherent power of the High Court as Courts of Record but there is no restriction on the jurisdiction and power of the High Court. Moreover, the law of contempt is itself restriction on the freedom of speech and its validity

must be decided by reference to Article 19 (2). The free speech of a citizen in the interest of contempt of court can be subjected to such restrictions as Parliament considers reasonable. These restrictions are both substantive as well as procedural. If Parliament in its wisdom says that a particular conduct shall not be contempt of court it is not open to the Supreme Court to punish it as such. It is judicial arrogance for the Supreme Court to repudiate the force of a parliamentary statute.

The second change pertains to the fact that the contemnor spoke the truth or what with due care and caution he believed to be the truth should negate liability for contempt. This can be accomplished by adding a suitable explanation of Section 13 of the Contempt of Courts Act. That truth is a defence to charge of contempt has been indicated in a Constitution Bench judgment by Justice Mukherjea in the 1952 Reddy case which seems to have been ignored in subsequent decisions [*Bathina Ramakrishna Reddy v. State of Madras*; 1952 AIR 149, 1952 SCR 425]. The High Court of Australia clearly adopted this view in 1912. Australian judges are not less respected because of the liberal view of the contempt law. ‘Satya Meva Jayate’ must operate against judges as well.

The habit of trespassing into the legislative domain has more than once induced the Supreme Court to succumb to the temptation of advising lawmakers to enact a Uniform Civil Code. There are three separate questions the Supreme Court has not provoked and these require to be answered without aggravating communal acrimony and social conflict. Constitutional propriety, national integration and rational accommodation of religious scruples should be the rationale of any attempted answers.

The first question that arises is: Is it right for the Supreme Court to deliver gratuitous advice. My respectful answer is ‘No’.

Part IV deals with the Directive Principles of State Policy of which Article 44 forms only one of the 14 enumerated therein. It starts with Article 37. “Art 37, Application of the principles contained in this Part: The provisions in this Part **shall not** be enforceable by any court,

but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.”

The Directive Principles are not enforceable by the courts precisely because they constitute political, economic and social injunctions by the founding fathers to successive governments and legislatures in the country. The Supreme Court, in spite of its failings, is a highly revered institution enjoying the confidence of the people. For this reason the Supreme Court must realize that even its mild admonition will amount to an insidious attempt to bring about the enforcement of that which it is prohibited from enforcing. Implicit in the very act of advice to the legislature or the government is the insinuation that the two other organs are in default, the Supreme Court stands above them and is free to chastise them as inattentive schoolchildren.

The enactment of a Uniform Civil Code has been a matter of controversy between the majority and the minority communities since the dawn of independence. The Supreme Court’s advice amounts to taking sides, thereby descending into the political arena leaving its image to be besmirched by the dust of the conflict. The Shah Bano experience – [a controversial lawsuit in which the Supreme Court upheld the giving of maintenance to a divorced Muslim woman] – should have at least served as a deterrent. Not only was the actual decision reversed by legislation, the Supreme Court itself became the subject of political acrimony. Out of sheer regard for itself the court must resist the temptation of giving gratuitous advice.

The question of having a Uniform Civil Code was debated in the Constituent Assembly on November 23, 1948, in the shape of Draft Article 35. It had reached the House after having been discussed in several committees and at several places. Prominent Muslim members such as Mohamed Ismail Sahib, Naziruddin Ahmad, Mahboob Ali, Baig Sahib, Bagadur Pocker Sahib Bahadur and Hussain Imam participated in the very lively debate. Ranged on the other side were the redoubtable K.M. Munshi, Alladi Krishnaswamy Iyer and Dr B.R. Ambedkar himself.

The criticism of the Article was twofold: firstly, it infringes the Fundamental Right guaranteed by Draft Article 19 (which then corresponded to the present Article 25) and secondly, it is a tyranny on the minorities. The present Article 25 reads as follows: *Freedom of conscience and free profession, practice and propagation of religion (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion; (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law; (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.*

The most effective and reasoned criticism of the Article came from Hussain Imam [a politician from Bihar, member of the Constituent Assembly in 1946]. A part of his speech is worth quoting: “In a country so diverse, is it possible to have uniformly of civil law? We have ourselves further on provided for concurrent jurisdiction to the provinces as well as to the Centre in matters of succession, marriage, divorce and other things. How is it possible to have uniformity when there are eleven or twelve legislative bodies ready to legislate on a subject according to the requirements of their own people and their own circumstances? Look at the protection we have given to the backward classes. Their property is safeguarded in a manner in which other property is not safeguarded. In the Scheduled areas, I know of Jharkhand and Santhal Parganas – we have given certain circumstances which demand diversity in the civil laws. I therefore, feel, Sir, that in addition to the arguments before me, in which they feel apprehensive that their personal law will not be safe if this Directive is passed, I suggest that there are other difficulties also which are purely constitutional, depending not so much on the existence of different communities, as on the existence of different levels in the intelligence and equipment of the people of India.”

The argument based upon the infringement of Fundamental Right was easily repelled. The right itself is hedged with qualifications and limitations. The Constitution recognizes that there are many secular activities which may well be associated with religious practice and yet they can be regulated or restricted. All economic, financial, political or other secular activities cannot be immune from parliamentary legislation on the ground that some religious groups believe them to be part of their religion. The Constitution itself permits legislation for social welfare and reform.

In 1955, Hindu Law was extensively modified and some principles of Muslim and Christian laws were incorporated in it. Hindu society has not been enfeebled by this. On the contrary it has been vastly strengthened and improved.

Mr Munshi convincingly argued that no law can be declared invalid on the ground that it seeks to modify the personal law of any section of the citizens of India. The Indian Penal Code, the Evidence Act and the Transfer of Property Act all significantly repeal or modify a good bit of Shariat law. He went on to argue: “We think we have got national unity. But there are many factors – and important factors – which still offer serious dangers to our national consolidation, and it very necessary that the whole of our life, so far as it is restricted to secular spheres, must be unified in such a way that as early as possible ... by the way we live, by our personal law, we are a strong and consolidated nation. From that point of view alone, I submit, the Opposition is not very well advised. I hope our friends will not feel that this is an attempt to exercise tyranny over a minority; it is much more tyrannous to the majority.”

Is, then, the Muslim opposition to the Uniform Civil Code rational? This is the second question. The answer is again a resounding ‘No’. The opposition is based on a total misunderstanding of the great prophet of Islam. Let us hark back to a Hadith in which the Prophet asked one of his delegates, Mu’az, by what criteria he would administer the regions assigned to his control.

“The Koran” the man replied.

“And then what?” the Prophet asked.

“The Sunnah.” (or example of the Prophet)

“And then what?”

“Then I will make personal effort (Ijtihad) and act according to that.”  
And this the Prophet approved.

In every novel situation where earlier rules or precedents become inequitable or cruel, every individual has to become a Mu'az and reach a decision according to his conscience and intellect. Muslim societies in a pluralistic democracy is a case never contemplated in seventh century Arabia. The Prophet wants his followers to think for themselves and arrive at decisions which best serve the public good (Istisical).

The third and last question is: Is there any urgency in the present domestic and international situation warranting the promulgation of a Uniform Civil Code here and now? Again, the answer is in the negative.

For this let us hear Dr B.R. Ambedkar. He pointed out that most of the personal law had already been repealed and substituted by secular codes. The only areas that have remained untouched are marriage and succession. He then proceeded to give an assurance to the minorities who were opposed to the article. It is this which ought to curb the irrational enthusiasm generated by the Supreme Court's latest observations: “I think they have read rather too much into Article 35, which merely proposes that the State shall endeavor to secure a civil code for the citizens of the country. It does not say that after the code is framed the State shall enforce it upon all citizens merely because they are citizens. It is perfectly possible that the future Parliament may make a provision by way of making a beginning that the code shall apply only to those who make a declaration that they are prepared to be bound by it, so that in the initial stage the application of the code

may be purely voluntary. Parliament may feel the ground by some such method.”

Neither the Supreme Court nor the zealous supporters of a Uniform Civil Code have done any serious thinking about what this code would look like. Hindus marry in the presence of the priest and the sacred fire. Muslims marry by nikah in the presence of vakils who communicate mutual consent of the parties. How should we make a uniform code for both? Should we impose the Hindu form on the Muslims or the Muslim form on the Hindus or should we produce some bizarre mixture of the two? There is a special marriage act under which one can marry in a purely secular form.

I refuse to believe that a uniform code is going to produce national integration. It will only produce communal discord. The words of Articles 44 are significant – “the State shall secure for its citizens”, in other words, it will provide something the citizens want. There certainly is an assurance that normally no coercion will be employed unless it becomes a matter of national survival. I do not think the nation is facing any such emergency. It is wise to recall that the Supreme Court itself in the January 1996 case of *Pannalal Bansilal Pitti & Ors v. State of Andhra Pradesh & Another*, 1996 AIR 1023, 1996 SCC (2) 498]. I add: it will be disastrous. The government wisely gave an undertaking to the court that it will not act without consent of the communities involved.

Let me now wind up by reverting to Nani Palkhivala again. He turned out to be a sensitive soul who found the world more corrupt than he had hoped and governments more inept than he had imagined. He lived in an environment filled with malign flatterers, hypocrites and poseurs, fake ascetics and even pimps of the press. From all he was determined to keep the secret that he was a glorious mixture of the hedonist and puritan with a tough shell, hiding a fine and gentle core. Neither in professional practice nor in politics did he ever tread water.

He regularly took a header into deep waters and the splash usually shocked envious spectators.

The British statesman, Lord Brougham, in his peroration of the speech on law reform said: “It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign’s boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.”

Nani could justly boast that he found India’s Constitution in a wobbly state. He made its foundations firm. He found the nation weakened by sectarian discord. He applied soothing honey to its smarting wounds by preaching the doctrine of love and harmony.

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*Ram Jethmalani (1923-2019) was an eminent jurist and a highly sought after senior advocate who handled some of the most high profile cases in the Supreme Court of India. He served as a Member of Parliament and Union Minister at different times. He was an acclaimed public speaker who brought into focus major constitutional and political controversies.*

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# **Law and Judicial System for the Next Society**

**Justice M.N. Venkatachaliah**

April 20, 2004

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This foundation bears the name of one of the greatest lawyers of this country and truly one of greatest gentlemen of our times. Rajaji described Palkhivala as “God’s gift to India”. As somebody said, Palkhivala belonged to the “glorious tribe of selfless men”.

Palkhivala had a speech impediment that gave him little chance of becoming an advocate and public speaker, but his determination and character made him surmount the obstacles to become one of the finest lawyers the country has seen. He loved India passionately. He was very wise too. It is said “to tax and please people, to love and to be wise are not given to men”. Palkhivala’s universal and impersonal love of his country sustained his great wisdom and goodness. Many learned men have written about Palkhivala’s forensic skills and his great gifts of heart and to speak of them again are to hold a candle to the sun. As one writer said in his tribute: “The people of India have already installed him in their hearts as Navaratna and his stature will always outsoar all honours that we can bestow on him.”

## **Vision of the Next Society**

### ***(a) Democracy and the Polity of Future Society***

India, it is rightly said, lives concurrently in several centuries. The mindsets of some place them in the medieval period. Those who believe in the brave new world share the thoughts and stimuli of the current century in the western world. According to some, the mid-point in the developmental history of the last 2000 years is not the end of the first millennium but 1900, that is, the development of the last 100 years of the second millennium far outweighs that of the earlier 1900 years. Similarly, it is said that the mid-point of the twentieth century is not the end of the first 50 years but the end of 90 years. That is, the development of the last 10 years far outweighs the development of the first 90 years.

The world is disparate. The top one-fifth of the world's rich has 86 per cent of the world's GDP and controls 82 per cent of the world's export markets. The bottom quintile has just one per cent of both. Prof. Jeffrey Sachs in an article in *The Economist* titled 'New Map of the World' says, "Today's world is not divided by ideology but by technology. A small part of the globe, accounting for about 15 per cent of the world's population, provides nearly all of the world's technology innovations. A second part, involving half of the world's population, is technologically disconnected."

Today, the largest single export from the US is not aeroplanes or computers. It is entertainment material: music, films, etc. The area of change is in the social impact of technology and the information revolution, and the emergence of internet and e-commerce. The elimination of distance began with the railroad expansion in the nineteenth century. "The first ones to see the importance," says management consultant Prof. Peter Drucker, "were the Rothschilds, who built the first long distance line from Vienna to Prague. And when the Austrian Chancellor went to the emperor, who hated Rothschild but had to give his consent to the plan, the emperor just

laughed and said ‘Thank God, at last they are going to lose their shirt. We already have a stage coach that goes from Vienna to Prague three times a week, and it is always empty.’ ” That railroad was sold out from day one.

The world has come even closer with faster transport and communications. But the internet and e-commerce are revolutionary in their impact on the future course of industrial civilization. Prof. Drucker observes: “It is something that practically no one foresaw or, indeed, even talked about ten or fifteen years ago: e-commerce – that is, the explosive emergence of the internet as a major, perhaps eventually the major, worldwide distribution channel for goods, for services, and surprisingly, for managerial and professional jobs. This is profoundly changing economies, markets and industry structure, products and services and their flow; consumer segmentation, consumer values and consumer behavior; jobs and labour markets. But the impact may be even greater on societies and politics and, above all, on the way we see the world and ourselves in it.”

### ***(b) Economy, Science and Technology***

The Asian edition of *Business Week* (October 8, 2003) said that by “some estimates, there are more Information Technologists in Bangalore (1,50,000) than the Silicon Valley (1,20,000)” and that “India’s brain power is already reshaping corporate America”. There is a virtual euphoria about the prospects of Indian economic growth in the coming two decades. The extrapolations suggest that while the present GDP of half-a-trillion will explode into 15 trillion, that is, a surge of 30 times, in the next decade, it is also estimated that the exports of IT-related services, which are currently about three billion dollars will, in the next five years, grow to 24 billion dollars. The number of graduates with college degrees in engineering will rise from the current 2,60,000 to 5,50,000 in just seven years.

It is said if India can turn into a fast-growth economy, “It will be the first developing nation that has used its brainpower, not natural resources or the raw muscle of factory labour, as the catalyst” – not a small

compliment. In comparative terms, China has shown greater potential for growth. It started opening up its economy in 1979 whereas India did so only in the early nineties. China has a growth of an average of eight per cent over the past decade. India's has been around six per cent. Infrastructure such as highways, energy, etc. is superior in China. The foreign investment in China is about 50 billion dollars and in India it is about four billion dollars. China's export was about 266 billion dollars in 2002 and that was four times more than that of India's. But India has its own advantages. Its chaotic but robust democracy is one of them. The Indian population under 25 years of age is about 53 per cent. One of the impressive plus points is the emergence of a culture of high profile technical and management education in India. There is an increased awareness of the need to absorb high standards to drive an internationally competitive economy.

The twenty-first century will be the most stunning in human history. By 2040, the life expectancy of a human being will rise to a full 100 years. If I may recall it was just 20 years for an Indian in 1910; in 2000, it became 80 years for the urban female in Kerala. Breakthroughs in science and technology will bring changes that will border on the fantastic. The thrust areas in the next decade are in healthcare, medical electronics, oceanography, nano technology, genetically modified food, micro robotics, biotechnology energy, education and space research, and spectacular breakthroughs in the fields of renewable energy such as fuel cells and plasma energy that will revolutionize the energy scenario.

### ***(c) Knowledge Economy and its Implications***

Throughout human history, spectacular changes in the life-cycle of civilizations have followed in the wake of the advent of new energy sources. Each such crossover point has witnessed tremendous economic and social volatility. Employment patterns have changed, life-styles, mindsets, all have changed. We have seen this happen with the advent of steam power, with electricity, with information technology and currently with the knowledge economy.

## **Judiciary in the Next Society**

Confucius said that it is a “curse to live in interesting times”. The times ahead are not going to be merely interesting but exciting. Economic development must go hand in hand with social opportunity. Health, education, human dignity, human rights, human security are not the rewards of development. They are crucial to the very process of development. Economist Amartya Sen said that these public goods are not the social outcome of economic reform but really economic outcomes of social reforms. Economic development without social opportunity will merely lead to growth that is ruthless, rootless, futureless, voiceless and jobless.

Crucial to the convergence of social and economic development is the role of the legal system and the judiciary. I shall refer to four areas that need urgent attention in the judicial system. The first of course is the reformation of the criminal justice system with an emphasis on case-flow management. The second is the expeditious resolution of commercial disputes. The third is the challenge of the new biology that will raise frontier issues in law and morality, law and ethics, law and environment. The fourth is the area of constitutional adjudications and judicial review.

### ***(a) Criminal Justice System***

For paucity of time I shall not refer to the substantive and procedural aspects of criminal law and the criminal justice system. I will confine my comments to the available alternative models of case-flow management by the use of ‘customer focused models’ and to identify opportunities for a more streamlined system by the application of ‘virtual organization’ philosophy, described as the process of application of the principles of supply-chain management to this problem, equating the stakeholders involved in the delivery of the service with the suppliers in a commercial organization. The innovators of this system identify the ‘key suppliers’ in the criminal justice system supply chain: the police, the prosecutors, witnesses, defence lawyers. (Michael M. Kaye and Marilyn Dyason have discussed the process in

their article, 'Applying Six Sigma in Public Sector'. The system with requisite changes appropriate to Indian conditions is a model that deserves consideration.)

It is needless to emphasize that the criminal justice system is not only the backbone of law and order but has a civilizational value and status. It is not insignificant that in the advanced countries even the impressive view of the appearance and architecture of buildings housing the criminal courts is an informed choice. They make a statement as to how important the community considers dispensation of criminal justice to orderly living. The criminal justice system is crucial to the survival of all other economic and social institutions. That area today is in a state of disrepair.

There is a growing feeling that the proliferation of courts is the solution to the problems of arrears in courts. That in India judge-strength is just 10.29 per million population has become some sort of a slogan around which judicial reforms are built. Surely the number of judges is inadequate. But we might have to pause here to think. Is the number of judges per million population the appropriate yardstick? Or must the number of judges be proportionate to the number of cases? A wag uncharitably commented that the first proposition is similar to the idea of responding to the breakout of an epidemic by opening up new graveyards. Contrary to the popular myth of excessive litigiousness in India, the use of courts by the people is comparatively low. For instance, the annual rate of filing in India is just about 10 per cent of that obtaining in Germany.

Many lawyers have argued that judge strength should bear a proportion to the number of cases and not to the population. Some even say that in terms of the former, India is more favourably positioned than some advanced countries. But the only thing lacking, they point out, is a proper system of case-flow management and the total lack of appropriate auxiliary adjudicative systems and services.

***(b) Efficient Management of Commercial Causes***

Equally indispensable is the speedy resolution of commercial causes. The present scenario of long delays deters economic and commercial activity and lead to institutional conflicts over jurisdiction. With the growth of the economy the adequacy of present systems to deal with arbitration, intellectual property disputes, patent actions, enforcement of commercial contracts, securitization and corporate insolvency and investor protection disputes needs to be re-assessed.

In a festschrift brought out in honour of Prof. A.C. Guest in 1997, the contributors explained the concept of commercial causes and discussed the adequacy of institutional machinery for dispute resolution. This is an area that needs urgent attention to prevent the increasingly undeletable instances of forum shopping and clutching at jurisdictions.

***(c) Challenges of New Biology, Ethical Issues and Dilemmas in Bio-medical Research and Experimentation***

With the tremendous advances in medical science and technology, all branches of medicine and surgery have made tremendous progress. Indeed, some of the results of genetic re-engineering and ART (assisted reproductive technology) border on the fantastic. The excitement started with the case of Louise Brown – the girl who became famous even before she was born – and the excitement has not abated. The frontier-line researches in ART have lead to breathtaking breakthroughs into nature's hitherto safely guarded secrets. Genome mapping, genetic recombinant engineering, assisted reproductive technology, stem cell research, DNA fingerprinting, human cloning, etc. have opened up hitherto unimagined vistas in the practical application of biomedical technologies for the benefit of mankind. Human fetal tissue is used for a wide range of purposes. This idea of using fetal cells as transplants started with the treatment of patients with loss of nerve cells in the brain and spinal chord. Since damaged nerve cells do not regenerate, attempts to trick neurons to

repair and regrow are yet to bear fruit. Attempts were then made to transplant neuron cells to re-establish damaged neural circuits. But the immunological complications that result whenever any foreign tissue is transplanted into a human proved a barrier. Other potential areas of fetal tissue are improvements in the treatment of diabetes, genetic optic nerve defects, spinal injury, Alzheimer's and acute leukemia and liver failure. Xeno transplantation is another area of interesting research.

The area of special interest to gynecology is assisted reproduction, which is defined as "Manipulating the gametes outside the body and transfer of embryos into the body". It is estimated that there are 60 to 80 million infertile couples worldwide (almost 10 per cent of all couples). The advent of ART has enhanced the possibility of child-bearing and has made conception possible in cases that were considered impossible earlier. ART requires enormous technological expertise and expensive equipment. It carries less than 30 per cent success rate and taxes couples' endurance physically, economically and emotionally.

ART presents many ethical issues and medical dilemmas. There have been legal issues – one such being the "IVF mix up", when black twins were born to a white couple after an apparent blunder at an IVF clinic. Then again if the embryo is placed in the wrong womb, the question arises as to who the real parents are. It is said that even certain basic concepts such as 'motherhood', 'legitimacy', 'parentage', etc., need to be redefined.

There are also, what some uncharitably call "court-aided disasters". One such was from Oliver Wendell Holmes, the "magnificent Yankee" from Boston, a great judge who wrote 2,000 opinions in his long and illustrious career but signed on to the eugenics movement so enthusiastically to uphold a law of the state of Virginia (Virginia Sterilization Act of 1924) which took power to sterilize mentally defective persons. The court's decision triggered a wide sterilization move. Nearly 8,000 men and women in Virginia alone and more than

60,000 nationwide were sterilized under this move. So much so that the Virginia legislature recently passed a resolution of apology for the incalculable damage done. A woman, Carrie Buck, had challenged the Virginia law (*Buck v. Bell*, 1927) before the US Supreme Court for violation of the Fourteenth Amendment. The judge's description of the petitioner itself foretold the fate of the challenge. Justice Holmes called Carrie Buck "a feeble-minded white woman who was committed to the State Colony in due form. She is the daughter of a feeble-minded mother in the same institution and mother of an illegitimate feeble-minded child" and declared that "three generations of imbeciles are enough". The principle that sustains compulsory vaccination, according to the judge, was broad enough to cover cutting the fallopian tubes.

In another case, a lady sued her doctor for a failed tubectomy resulting in an unwanted childbirth. An English judge was of the view that it was opposed to public policy to hold a legitimate childbirth actionable, for the birth of a child was always a matter of joy and that at least a child should never know that his or her birth had been declared by a court to be the result of a mistake.

Another area of concern is "embryo ethics"; the question whether excess human embryos – "the frozen orphans" – should be adopted. In the process of assisting conception, doctors end up creating many embryos. What should be done to the ones that are not implanted? It is estimated that a large number of reduction procedures are carried out in the US each year. The number, it is said, is more than twice the number of Korean children adopted by US citizens. In the famous case of *Roe v. Wade*, very far-reaching ethical issues were raised in the context of the right of abortion as part of the right to privacy claimed by a woman. The larger issues were: When does life commence? At or after conception? Is the fetus a 'person' in law? The court did not accept the Christian belief that life commenced at the very conception.

Other questions involved are: Could there be damage to the embryos due to freezing? Ethically is it acceptable to ask people to adopt

embryos when the adoptive parents cannot be told about the future health of these children? Will there be a new group of trial lawyers suing for wrongful embryo adoption? Who will be the target of such suits?

Surrogacy arrangements have also produced emotional and legal hassles. Another area of concern is pre-natal sex detection tests, which have contributed to the number of “missing women”, upsetting the male:female ratio. Female infanticide is a particular scourge in India.

All these issues conceal a more fundamental debate. Is creation the handiwork of an all-knowing Almighty? Is the world a moral order? Is the evolutionary process informed by a transcendental purpose? Is it ethical and safe to tamper with some of the fundamental frameworks of nature? On the other hand, the protagonists of a Brave New World argue that there are only two limits to the scope of interference with nature – knowledge and ability, the former in the form of science and the latter in the form of technology. Given these two there are, they argue, no limits on scientific experiments. This ethical neutrality will assume justiciable proportions though their adjudicative dispositions raise difficult problems.

The ultimate question is whether the judiciary is able to take on and handle with efficiency the issues that characterize the next society. What structural and functional changes must it adopt and undergo?

#### ***(d) Judicial Review***

In a sense, the power to nullify laws passed by the elected representatives of the people by an unelected, non-representative set of judges has its own anti-majoritarian implications. This plausible anti-majoritarian nature of judicial review is counter-balanced by judicial restraint whose chief proponent was Prof. James Bradley Thayer. This philosophy of judicial restraint which was the hallmark of judges like Holmes, Benjamin Cordozo, Felix Frankfurter, Louis Brandeis and Hugo Black, was echoed in the early decisions and famous dissents of the US Supreme Court.

But a more expansive statement of judicial review was expressed by Chief Justice P.N. Bhagwati: “Judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is.”

Justice Holmes said something different: “I do not think the United States would come to an end if we lost our power to declare an act of the Congress void.”

### **American Due Process**

In distinct periods of American judicial history, the expression “due process” acquired distinct connotations. The judges of the *Lochner* era – [the period 1897-1937 when the Supreme Court struck down certain economic regulations passed by states] – were all born before the industrial revolution. They had their own mind-set. It almost tended to make the Supreme Court of the United States the third house of legislature. The turning point was indeed the effect of the appalling human conditions resulting from the Great Depression. A learned author gives a graphic picture of those conditions: “In November 1929 the bubble burst. The collapse of stock market prices measured the collapse of the entire economic structure. In the summer of 1929 the Dow Jones average for industrial stocks had been 381.17. In the summer of 1932 it was 41.22; 90 per cent of the value disappeared.”

“The plight of the farmers was worse. Corn was sold for seven cents a bushel, sugar for three cents per pound. Twenty five per cent of the land in Mississippi was sold at auction on the foreclosure of mortgages.”

“The plight of industry was no better. In the three-year period of December 31, 1930, to December 31, 1933, the gross national product fell from 194.4 to 56. Bankruptcy, liquidation and reorganization were a chief business in the legal profession. The average wage of the factory workers was forty cents per hour. Factory payrolls were cut

in half. One of every four men available for work was unemployed. There were no labour unions, no unemployment compensation, and no social security.”

“In one group of labourers were found clergymen, engineers, a school principal and a bank president. For factory workers the depression meant unemployment. Bread lines and soup kitchens. Municipal bankruptcies were common. The young hit the road. One young hobo was Eric Severeid, a banker’s son, whose face and voice would become familiar to millions of CBS News Programme [viewers]. The estimates of the number of youths who lives as tramps ran up to two million.”

The judicial attitudes to the New Deal legislations changed under circumstances which had their own dramatic overtones. [The New Deal was a series of programmes, public works projects, financial reforms and regulations enacted in the US by President Franklin Roosevelt between 1933 and 1936 that attempted to counteract the effects of the Great Depression.] That needed someone like Roosevelt who gave a new promise of hope to the nation. He declared that “the only thing we have to fear is fear itself”. The nation rallied behind him. These economic events had their own influence on judicial attitudes. Some writers even called it the demise of “Due Process”.

In 1963, the US Supreme Court had occasion to acknowledge these changes in judicial attitudes towards legislation: “The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns* and like cases – that due process authorizes court to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, ‘we are not concerned .... with the wisdom, need, or appropriateness of the legislation. Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to subject the state

to an intolerable supervision hostile to the a basic principles of our Government and beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.’ ”

Those who blame the Constitution for our ills seem to argue that our dismal political performance is by some constitutional compulsion. Sir Alladi Krishnaswamy Aiyar set the right note. He said: “..... it need hardly be pointed out that the proper functioning of the Constitution will to a large extent depend upon: (1) ancillary organic laws passed to implement the Constitution; (2) the utilization of the principles of what I may style as the common law of India which has grown up under the British regime by the adoption in part of the principles of English Common Law as the matter of justice, equity and good conscience; (3) the acceptance of conventions in the working of our Constitution similar to those obtaining in other constitutions; and (4) judicial decision interpreting the Constitution, the Supreme Court being constituted the final arbiter of the Constitution. Above all, it is the law-abiding spirit of the average citizen in India that I regard as the greatest asset in the proper working of the Constitution.”

Constitutional adjudication, therefore, has the urgent task of defining or redefining basic constitutional concepts in a changing and disparate world. Success is far more difficult to handle than failures. To ensure the most basic of all systems, namely, parities of the electoral process, it is necessary judicially to define the minimal essential components of the constitutional concept of democracy and its essential concomitants, namely the electoral processes, and prescribe the minimal requirements of an acceptable process. These tasks have to be accomplished, of course, with the assistance of efficacy of the ancillary laws and their plentitude to transform constitutional vision and promise to reality is justiciable within the judicial purview on the touch-stone of how effective the ancillary laws are in realizing the constitutional goals and transforming constitutional phrase into reality.

Of the developed countries, about 19 have a population of less than one crore and each has its own parliament, executive and supreme court. There is, therefore, adequate access for the citizens to the institutions. Some of the challenges of the next society to the judicial system will be new ones; some others the old questions reappearing with renewed vigour.

Judicial policy is directed to the management of certain apparent contradictions in society. For instance, the exercise of individual freedom might conflict with the interest of society. This is one of the themes of the preamble of the Constitution; the dignity of the individual on the one hand and the unity and integrity of the country on the other. Similarly, exercise of democratic power on the one hand and legal control of government on the other, pose seemingly irreconcilable problems. That is why it is said that “judicial review has no support outside public confidence”.

When Sir Edward Coke remarked that all “causes (be) measured by the golden and straight mete wand of law, and not by the certain and crooked cord of discretion”, he was referring to ‘private opinion’ masquerading as discretion. Unless public law issues and judicial pronouncements are carefully discussed, law will not develop. The Palkhivala Foundation will, I am sure, aid this essential process. That would be an endeavour dear to the heart of Palkhivala.

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# Indian Foreign Policy Challenges in the 21<sup>st</sup> Century

G. Parthasarathy

June 19, 2004

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I had the privilege of meeting and working with Mr Nani Palkhivala just over a quarter of a century ago, when I joined the Embassy of India, Washington, as its Political Counsellor in August 1978. Mr Palkhivala was then our ambassador to the United States. There have been very few people in our country in contemporary times who could combine a brilliant and incisive judicial mind with the natural erudition and unquestionable integrity of Mr Palkhivala. A few instances of this that I observed are worth noting.

Mr Palkhivala was appointed ambassador just after the dark Emergency rule, with changes being effected even in the preamble to the Constitution. I told Mr Palkhivala that it would be rather unfortunate if embassy publications that brought out the beautifully crafted preamble were to be modified. His answer was that as the preamble stated that as the people of India had “adopted, enacted and given unto themselves” this Constitution in 1949, it made no sense for Parliament to amend something that the people of India had bequeathed unto themselves over a quarter of a century earlier!

There was another occasion when Mr Palkhivala showed his inimitable sense of personal integrity. The Janata Party government headed by Mr Morarji Desai had proposed a so-called 'Freedom of Religion' Bill in 1979, whose provisions caused unease and apprehension in India. The Bill also raised queries across the world, with apprehensions that it was designed to curb religious freedom in India. I shared this view and told Mr Palkhivala that I found it repugnant for a secular country like India to enact such legislation. I added that I really could not defend this action of our government with due conscience. Mr Palkhivala told me that he entirely agreed with me and that we should make our reservations clear to Delhi on the grounds that enactment of the Bill would seriously undermine India's credibility abroad as a nation committed to religious freedom. Shortly thereafter, the then Foreign Minister, Mr Atal Bihari Vajpayee, visited Washington. Mr Palkhivala quite candidly expressed his distaste for the Bill and told Mr Vajpayee that I shared his reservations. It was this kind of integrity and courage of conviction that was characteristic of Mr Palkhivala. He never feared or hesitated to express what he felt.

Mr Palkhivala had great belief in the resilience of our democratic institutions. He was also a strong opponent of the then prevailing 'licence, permit, quota raj'. He strongly felt that India would achieve its manifest destiny only when its people were allowed to fully develop and utilize their creative abilities, free from government interference in their day-to-day economic lives.

As we go through the first years of the twenty-first century there are many developments that Mr Palkhivala would have been proud of. India's democracy and democratic institutions are coming of age. There is worldwide admiration for the strength and resilience of our democratic institutions. I was in the United States recently and was amused when some American friends told me that if the US had institutions like our Election Commission they would perhaps have been able to avoid the confusion in Florida that determined the result of the last presidential elections! The Indian economy is now

showing the potential to grow at over six per cent per annum and is regarded as one of the fastest growing economies in the world. It is no secret that corruption, decline in the standards of governance and the criminalization of politics is increasing. But we could well consider these as phenomena inherent in a growing democracy. We can proudly assert that never in human history have so many people with such distinct linguistic, ethnic, cultural and religious diversities lived together as one nation state.

While the predominant focus of attention is now on recent domestic developments in the wake of the general elections, there has been a tendency to pay less than adequate attention to the external challenges we now face. The twentieth century was in many ways epochal. For the first time in human history there were two wars that engulfed the whole world causing destruction and loss of human lives across the globe. These wars were followed by the emergence of the Cold War and a bipolar world order. The twentieth century also saw the emergence of weapons of mass destruction and a nuclear balance of terror between the Cold War protagonists – the US and its allies on one side, representing to so-called free world, and the Soviet Union and its reluctant Warsaw Pact allies on the other. Paradoxically, it was the prevalence of capabilities for ‘mutually assured destruction’ that ensured global peace amidst great power rivalry and regional conflicts worldwide. The twentieth century also saw the end of global colonial empires and the emergence of international organizations like the League of Nations and the United Nations (UN) to promote peace, security and cooperation. Most importantly, the twentieth century was a period when human creativity and ingenuity blossomed, leading to constant refinement in the weapons of war on the one hand and the spread of unprecedented prosperity, productivity and life expectancy on the other.

The Cold War ended in the last years of the twentieth century. It did not end with the military defeat of one of the adversaries, but by its internal collapse. The contradictions within the totalitarian Soviet

society led to the disintegration of the Soviet Union and the emergence of a unipolar world order dominated by the United States. The last years of the twentieth century also saw the emergence of economic globalization that set in motion a process of progressive reduction of tariffs and increasing economic integration.

It is pertinent to note here that in the first few decades after we attained independence, India sought to achieve economic self-reliance through a highly protective tariff regime and a resort to 'import substitution'. These policies led to a progressive decline in India's share of world trade and our growing marginalization in global economic issues. It is also worth noting that countries in East Asia that adopted a policy of trade liberalization and integration in world markets achieved much higher rates of economic growth, human resource development and share of world trade than we did in India. There is invariably a correlation between the growing share of world trade of a country on the one hand and the levels of prosperity that its people achieve on the other.

Economic globalization provides both opportunities and challenges for India. Given the fact that Indian industry and agriculture functioned in a highly protected environment for nearly four decades, there are naturally concerns in India about the impact of trade liberalization on employment prospects within the country. There is little doubt that global organizations like the UN and the World Trade Organization (WTO) are inequitable and dominated by the western world. The agreements following the Uruguay Round of trade negotiations that led to the emergence of the WTO were certainly inequitable and largely designed to promote the interests of the affluent countries in North America and in the European Union (EU). But the importance of these organizations that seek to at least notionally promote an equitable world order cannot be overemphasized. China chose to join the WTO despite the onerous conditions imposed on it by the US and the EU for securing membership. This only confirms that despite the inherently inequitable trade practices that now prevail, it is far

more realistic to join such organizations and seek change, rather than remain outside them, as some in India would suggest.

Developing an equitable world economic order and resisting moves to impose the will of the more powerful members of the WTO is a major challenge that India is going to confront in the coming years. There is growing pressure from the US and the EU for yet another round of global negotiations on a broad range of economic issues including trade. But it is important to note that on some of these issues there are differences between the bureaucratically run, rule-bound EU on the one hand and the US on the other.

One of the main reasons for our failure to adequately protect our interests during the Uruguay Round was our obsession with being a leader of the so-called 'Third World'. We went on articulating what we believed were the interests of the developing countries, instead of recognizing the reality that developing countries themselves were in different stages of economic development, with differing economic interests. It was as a result of these differences that the western world was able to strike deals with individual developing countries, or groupings of developing countries, and progressively isolate us.

Mercifully, we now appear to have learned to shed the ideological inhibitions of the past and are forging pragmatic alliances with countries like South Africa, Brazil, Malaysia and China with whom we presently share common interests on WTO-related issues. But there are some hard realities that we will have to keep in mind as we proceed with this effort. Firstly, like in all other aspects of international relations, there are no permanent friends or permanent adversaries in dealing with global economic issues. Countries do not even have permanent interests on these issues as new technologies and economic developments have their own dynamics and create new situations. Further, we have to realize that unless we improve economic efficiency, competitiveness and productivity within our country and eschew populist policies that amount to fiscal irresponsibility, we cannot wield influence globally or emerge as a significant player in the councils of the world.

It is not the WTO alone that is dominated by the rich and affluent. The UN Security Council in which the five permanent members wield veto powers is also primarily an instrument for promoting the global security interests of its permanent members, particularly the US. With the exception of the American decision to invade Iraq that was opposed by France and Russia (both of whom had wide-ranging agreements for oil exploration with the Saddam Hussein dispensation), there has been virtually no case where other members of the Security Council have stood in the way of the US when it has decided to use military force. Even today, both the UN Secretary-General Kofi Annan and his Special Representative to Iraq, Lakhdar Brahmi, merely endorse many a *fait accompli* that they are presented with by the Americans in Iraq. It is also interesting to note that over the past decade there has scarcely been a single instance where China has opposed US actions or proposals in the UN. But, it does appear that after its experiences in Afghanistan and Iraq, the US will have to be more circumspect in the use of military power to achieve its national objectives, especially where such actions may have to be undertaken unilaterally and without regional consensus. We should also understand that moves to expand the Security Council to accommodate emerging powers like Japan, Germany, India and Brazil appear unlikely to bear fruit in the near future.

The prime aim of any country's foreign policy is to enhance its security. But security does not merely mean the physical security of a country's borders. Foreign and national security policies have to be designed to develop an ability to defend territorial integrity, way of life and the economic welfare and well-being of the country in the face of external challenges. Thus, while the armed forces do have a role to play in defending the territorial integrity of the country, it is through an imaginative foreign policy that circumstances are created to resolve differences and promote cooperation to meet challenges that a country may face to its values and to the welfare and well-being of its citizens.

For over the last 50 years we have faced challenges to our territorial integrity from Pakistan and China. Pakistan has sought to undermine Indian secularism and our unity and territorial integrity through the use of terrorism and low-intensity conflict. China has sought to reduce tensions and resolve problems through negotiations with us on the one hand, while simultaneously seeking to ‘contain’ us by wide-ranging transfer of weapons, including nuclear weapons designs and missiles, to our neighbors. We are also now faced with a situation following the American-led military intervention in Afghanistan, in which American and NATO (North Atlantic Treaty Organization) forces are positioned close to our borders. The American-led intervention in Afghanistan has also led to a scattering of supporters of the Al Qaeda and the Taliban drawn from Pakistan, Central Asia, Chechnya, Indonesia, the Philippines and from across the Arab world, to the far corners of the world and particularly across the Indian Ocean region.

The Indian Ocean region can be regarded as the most volatile region in the world today because it contains a combustible mix of terrorism and oil. The dispersal of members of Osama bin Laden’s ‘International Islamic Front’ to countries like Saudi Arabia and Yemen to our west, and Bangladesh, Thailand and Indonesia to our east is a development we cannot ignore. The bulk of these terrorist groups have sought to primarily target western and Israeli nationals and interests. But the recent killings of Indian nationals in Saudi Arabia merely because they were ‘infidels’ and because the perpetrators of the killings reportedly wanted to avenge the “murder of our brothers in Kashmir” suggests that the Pakistani elements amongst bin Laden’s supporters, from groups affiliated to the International Islamic Front, like the Lashkar-e-Taiba and the Jaish-e-Mohammed, wish to target Indians and Indian interests as well. It would be naive to assume, as our government did on May 30, that the casualties at Khobar were “victims of circumstances rather than premeditated targets for attack”.

Sadly, the Americans have adopted such ham-handed methods and policies in Iraq that they are earning the wrath of the Islamic world

and radicalizing the polity of Islamic countries. Animosity towards the US has reached such an extent today that any country seen to be acting at America's behest will be viewed with suspicion and distaste by large sections of people in the Islamic world. Thus, while India will have to cooperate in all global and regional efforts to root out terrorism, it would not serve our national interests if we are perceived to be acting at America's behest. At the same time it would not be in the interest of any secular and pluralistic country if the Americans are seen to yield to the forces of radical Wahhabi Islam, as this would only strengthen the hands of those who believe in using violence and *jihad* as instruments of foreign policy.

The changing patterns of global energy consumption over the past three decades are another important factor in the geopolitics of the Indian Ocean region. The Persian Gulf to our west contains two-thirds of the world's reserves of oil. The Asia-Pacific region (from India eastwards) accounted for barely nine per cent of global energy consumption in 1970. It rose to 25 per cent in 1995. It is estimated to account for one-third of global energy consumption in 2020. The US Department of Energy has estimated that by 2020 Asian oil consumption will reach 38 million bpd (barrels per day), of which 80 per cent will be imported from the Persian Gulf.

A major factor in this changing energy scenario is the emergence of China as a fast-growing importer of oil since 1993. Roughly \$100 billion worth of oil is transported from the Straits of Hormuz to our west to the Straits of Malacca to our east annually. While we currently import around 80 million tonnes of oil annually, our oil imports are expected to increase to 150 million tonnes annually by 2020. We should also remember that around 3.5 million Indian nationals live in the Persian Gulf region. They remit around \$6.5 billion annually, substantially contributing to our comfortable balance of payments position. Any instability in the Persian Gulf, like the blowing up of oil pipelines or instability in Saudi Arabia, could send oil prices skyrocketing, subject our economy to inflationary pressures and cause

serious problems to our balance of payments. Guaranteeing of the country's energy security is thus going to remain a crucial item of foreign policy in the coming years. We would have to develop cooperative mechanisms for guaranteeing energy security by consultations with major energy consumers like the US, EU, China, Japan and South Korea on the one hand and the countries of the Gulf Cooperation Council, Russia, Iran and Iraq on the other.

Another emerging factor in the evolution of our foreign policy in recent years has been the significant strides that we have made in promoting economic integration with what is referred to as our 'extended neighbourhood' – a region that extends from the Persian Gulf on our west through Central and South Africa to the countries of East and South-East Asia. This area is home to over 60 per cent of the global population and over two-thirds of its hydrocarbon reserves. While Asia today accounts for a quarter of the world's GDP, it will contribute 57 per cent of the world's GDP in 2025. Japan, China, South Korea and India are already among the top 12 countries of the world in terms of GDP. The international reserves of the developing countries in Asia accounted for 77.5 per cent of the total international reserves of all developing countries in the world. In India, foreign currency reserves have grown from a bare \$1 billion in 1991 to around \$118 billion at present. The labour force in developing countries of the Asia-Pacific and South Asia totals around 1.7 billion, of which around 1.1 billion are accounted for by China and India alone. Given the fact that growth rates in Asia significantly outstrip those in other parts of the world, Asia will be the most dynamic region for global trade and investment in the coming decades.

In the next half century, as the population of the developed world ages, a younger and better-educated workforce in Asia will increasingly become the driving force for global manufacturing and growth. In these circumstances, it is imperative that India positions itself to be a key player in the emerging Asian economic scenario. There are some signs that there is recognition of the importance of these developments

and the need to reorient our policies to meet the challenges and avail itself of the opportunities that these developments present. At the same time, we are a country that is generally slow to change existing policies – policies that have rendered us a marginal player in flows of global foreign direct investment. And, given the nature of our politics where populism all too often prevails over economic rationalism, it remains to be seen whether we will indeed become a major player in the Asian and global economic order.

India has already moved in recent years to more closely integrate its markets with those of South and South-East Asia. We have, for long, had free trade arrangements with Nepal and Bhutan. We recently concluded a free trade agreement (FTA) with Sri Lanka, though we must acknowledge that the restrictions that we placed initially on key Sri Lankan exports like tea and rubber in response to domestic pressures to protect our industries, did make this agreement iniquitous. The seven member countries of SAARC (South Asian Association for Regional Cooperation) concluded an FTA during the recent summit in Islamabad in January 2004. SAARC member countries have agreed to dismantle all trade barriers over the next decade, with special provisions being made for least developed countries like Bangladesh. It remains to be seen if the measures that have been suggested to compensate Bangladesh for losses in revenue can at all be implemented. It also remains to be seen whether Pakistan, which has adopted discriminatory practices against Indian exports, fulfils the commitments it has made. It is, therefore, important that India should have alternate regional groupings in place, should the efforts for economic integration through SAARC face hurdles. The recently set up BIMSTEC (Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation) comprising Bangladesh, India, Myanmar, Sri Lanka, Thailand, Nepal and Bhutan could be one such grouping to promote economic integration along our eastern shores.

While there has been considerable media attention in India on developments in SAARC, the real progress that one has seen in recent

years is in our wide-ranging cooperation and interaction with the member states of ASEAN (Association of South-East Asian Nations). While our trade turnover with ASEAN is around \$2 billion annually, it is significant that India-ASEAN trade has shown an increase of 400 per cent over the past decade. The most significant agreement with the ASEAN states was the Framework Agreement for Comprehensive Economic Cooperation signed by former Prime Minister Atal Bihari Vajpayee during the ASEAN summit in Bali in 2003. This agreement provides for negotiations that will lead to the signing of an FTA by June 2005. The FTA will come into force with all countries except the Philippines and the new members Cambodia, Laos, Myanmar and Vietnam (CLMV) by 2011. The provisions will be extended to the Philippines and CLMV by 2015 and 2016 respectively. What is important to note is that if the negotiations for SAFTA (South Asian Free Trade Area) succeed we could well have a vast zone of economic cooperation extending from Peshawar to our west to the Philippines to our east, within the next decade or so. This move will gather more substance if we combine it with imaginative steps to improve shipping, air, road and rail communications within the entire Asian region.

A process of regional economic integration that would promote trade, investment and tourism is, in my view, the most exciting prospect in the conduct of our foreign policy in the coming years. But we would be remiss if we did not seek to build on the progress that has been achieved in our ties with the US and China. Equally important is the growing strategic partnership with the Russian Federation. Russia, under Vladimir Putin's leadership, is determined to regain a pre-eminent position in the councils of the world. Given its vast size, natural resources and skilled manpower, it is only a question of time before Russia is able to become more assertive in defending its interests and in developing a multi-polar world order. It shares a natural complementarity of interests with India and has been a steadfast friend and partner. While we still have much to do to build up trade and economic relations, Russia will remain a long-term partner in developing our defence capabilities. This is a relationship that we have to nurture and expand.

The US is our largest trade and economic partner and is likely to remain so. India's strategic importance has now been clearly recognized in the White House. The Bush National Security Doctrine of 2002 proclaims: "U.S. interests require a strong relationship with India. We are the two largest democracies, committed to political freedoms protected by representative Government. India is moving towards greater economic freedom as well. We have a common interest in the free flow of trade through the vital sea-lanes of the Indian Ocean. Finally we share an interest in fighting terrorism and creating a strategically stable Asia."

The real challenge for Indian diplomacy lies in being able to strengthen relations with the United States while making it clear to our American friends that they will have to learn to live with the reality that the views in Washington and New Delhi could differ on many issues, especially those pertaining to our immediate neighbourhood. At the same time we should avoid the tendency to pass critical comments on American actions, irrespective of whether or not such actions adversely affect our national interests. There is much that we have to learn from China which is very guarded and discreet in responding to US actions that do not have a direct bearing on its interests in its immediate neighbourhood.

The two major challenges to our diplomacy will lie in managing our relations with China and Pakistan. Our trade and economic ties with China have grown dramatically in recent years. Our trade with China is estimated to have grown by a remarkable 54 per cent in 2003 and reached a figure of around \$7.6 billion, which is more than double our stagnant trade with Japan. Our borders with China have been free of any tensions for over a decade now. But Chinese military cooperation with countries in our neighbourhood and its nuclear and missile proliferation with Pakistan remain a source of concern. But this should not deter us from seeking dialogue and cooperation with China in areas ranging from naval cooperation on the high seas to energy security and the environment.

There is need for a sense of balance in dealing with China. There are people in India in whose eyes China can do no wrong. There are others who call it our greatest security threat. The fact is that the Chinese have clear-cut national ambitions of emerging as the most powerful country in the world – a power centre that is both feared and respected. Their policies towards India will largely depend on how they view our economic and military strength and on how they perceive our approach to world affairs.

There has been some reduction in tensions in recent months in our relations with Pakistan. But it would be dangerous to underestimate the challenges we are going to face in the conduct of our relations with Pakistan. Speaking to the English Speaking Union of Pakistan (ESUP) in Karachi on April 12, 1999, Gen. Pervez Musharraf described the Lahore Declaration signed by Prime Ministers Vajpayee and Nawaz Sharif as nothing but “hot air”. He went on to say that, as India was a “hegemonic” power, “low intensity conflict” with India would continue even if the Kashmir issue was resolved. Kashmir, in the eyes of the military establishment that rules Pakistan, is thus just a *symptom* and not the *cause* of the tensions that characterize the relationship between India and Pakistan.

It is my view that there can be little prospect of a change in Pakistan’s approach in its relations with India until the army establishment that continues to play a dominant role in the national life of the country has a transformation in its mindset about India. But it should remain our effort to promote trade, economic and people-to-people contacts with Pakistan and be ready to engage our neighbour in dialogue and discussions on all issues of interest and concern. At the same time we have to be prepared for the possibility that the military establishment will continue with its policy of compulsive hostility towards India.

India is located in a rather violent and terrorist-infested neighbourhood. Ever since the Americans co-opted the ISI (Inter-Services Intelligence) to use militant Wahhabi-oriented Islam for what was said to be a *jihad* against the Soviet invaders in Afghanistan, a large number of sectarian

and militant groups have emerged in Pakistan that have established links with similar groups across the world. Osama bin Laden set up an 'International Islamic Front for Jihad against Jews and Crusaders' in Kandahar in February 1998 bringing together such groups. The ISI sought to use the members of this group to assist them in their so-called *jihad* in Jammu and Kashmir by getting groups like the Lashkar-e-Taiba to become members of bin Laden's Islamic Front. When Gen. Musharraf was forced to join the American war on terrorism, he had to ban and act against these groups, some of which have now turned against him. Pakistan is, therefore, set for a period of continuing violence unleashed by extremist Sunni groups that were once assets of both the ISI and the CIA (Central Intelligence Agency). Dealing with the terrorist violence that these groups are likely to continue against India, more often than not with covert ISI support, even while continuing a dialogue to promote cooperation and resolve differences with Pakistan, is going to remain a major foreign policy challenge for India.

Meeting the challenges posed by the growing strength of radical Islamic groups in Bangladesh is going to be as daunting a task as that of dealing with the challenges posed by Pakistan-sponsored terrorism. There are groups today in Bangladesh with close links to the ruling dispensation that openly advocate the establishment of an Islamic emirate in our North-East. There is also a burgeoning of madrasas and other institutions preaching religious bigotry and intolerance. Some of these groups have links with bin Laden's supporters. West Bengal and our North-Eastern States are likely to face growing problems of militancy and extremism as a result of these developments. Similarly, the growing Maoist insurgency in Nepal will have to be imaginatively tackled if we are to prevent it spreading across the border into Bihar. Finally, we will have to be actively and imaginatively involved in seeing that Sri Lanka emerges as a united, pluralistic society in which the rights of all sections of the people are respected and protected. Speaking from personal experience I can say that it is going to be difficult to get the LTTE (Liberation Tigers of Tamil Eelam) to

recognize that democratic politics requires it to respect dissent in north-eastern Sri Lanka. It is important to remember that the LTTE has sought to establish a virtual one party state in Sri Lanka's north-east by ruthlessly killing Tamil politicians who do not toe its line.

While I have dealt thus far on issues pertaining to our relations with countries across the world, I strongly believe that there is one issue that mankind as a whole needs to take very seriously. This is the issue of global warming and climate change. It has been estimated that since 750 AD, atmospheric concentrations of methane have gone up by 151 per cent. The current rate of increase of CO<sub>2</sub> concentrations, namely 1.5 ppm per year over the past two decades, is unprecedented at least over the last 20,000 years. Some 75 per cent of the anthropogenic CO<sub>2</sub> emissions are due to fossil fuel burning and the rest mainly due to land use, particularly deforestation. This has resulted in summer temperatures in Europe being at least 6 degrees Celsius higher than the 1961-69 average. In North India the temperatures in March 2004 were 5-7 degrees higher than normal. All this has resulted in a widespread retreat of mountain glaciers in non-polar regions. Global average sea level has increased between 0.1 and 0.2 metres during the twentieth century. El Nino events, which bring severe rainfall in some parts of the world and droughts in others, have become more frequent and intense during the past three decades. Coral reef bleaching, which leads to loss of bio-diversity in coastal areas, has become more frequent.

Recent expert studies have estimated that if current trends continue, weather patterns will become more erratic. We are slated to witness more floods in mountainous regions and prolonged droughts in grain-producing and coastal agricultural areas. These developments are expected to lead to significant weather changes in Europe, which will be hardest hit by climate change in the period 2010-2020. China is likely to be very hard hit by falling reliability of monsoon rains. It is also entirely possible that large parts of Bangladesh could become uninhabitable due to persistent typhoons and sea level rise. This could

lead to significant and even large-scale movements of people to more hospitable areas in India. Despite warnings from eminent scientists, the international community has shown little will or determination to deal with the emerging environmental scenario. Considerations of short-term commercial gains have prevailed over long-term imperatives. Developing the international will to work out equitable arrangements to meet these challenges should be a continuing priority in our foreign policy.

The twenty-first century is thus going to be a period of exciting challenges and opportunities for India. One can only hope and pray that our people and political leadership will show the sagacity and will to deal with these issues with imagination, foresight and courage.

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# Corporate Governance

Y. H. Malegam

January 10, 2004

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Nani Palkhivala was a legend in his lifetime. He possessed in abundant measure all those qualities that are admirable in a human being – humility in success, courage in adversity, uncompromising adherence to principles, unquestioned intellectual honesty, pride in his country and above all a deep concern for his fellow human beings. It is these qualities that inspired an entire generation.

It is reported that on one occasion when President John Kennedy had convened in the White House a gathering of the most talented individuals in the country from various fields, he welcomed them with the statement that the occasion was the largest gathering of talent in the White House since the time that Thomas Jefferson dined alone. Such a remark could well have been made about Nani Palkhivala. He combined within himself an extraordinary range of intellectual talents and his interests and scholarships extended well beyond his specialized field of jurisprudence. He has spoken and written knowledgeably on a variety of subjects including economics, history and religion. In a way, it is appropriate that the subject of this talk is corporate governance

because Nani exemplified in his life the three fundamental principles of corporate governance, namely, accountability, transparency and equality of treatment for all stakeholders.

Corporate governance became a buzzword in the corporate world with the publication in 1992 of the Cadbury Report. [Titled 'Financial Aspects of Corporate Government' and published in 1992, it was chaired by Adrian Cadbury; it sets out recommendations on the arrangements of boards and accounting systems to circumvent risks and failures in corporate governance.] But it is important to appreciate that Adrian Cadbury did not invent corporate governance. He merely gave it a form and substance and more importantly a definition as "the system by which companies are directed and controlled". The issue of corporate governance, in fact, arises from the fundamental basis on which public corporations are formed and operate, namely, the separation of ownership and control. This is essentially an agency problem. In this agency relationship, the shareholders are the risk-bearers while the managers are the decisions-makers. The danger is that the managers can act opportunistically at the expense of shareholders' interests, and corporate governance procedures and practices are primarily designated to prevent this abuse.

The problem becomes more complicated when control of an organization is concentrated in one or a group of a few shareholders. In such a situation, the agency problem degenerates into an insider-outsider problem. The insiders are the controlling shareholders together with the management which is beholden to them while the outsiders are the non-controlling shareholders. A conflict can arise if the insiders treat the outsiders not as partners but as mere providers of finance.

The need for corporate governance has, therefore, existed ever since the form of a joint stock company was devised many centuries ago. What has, however, brought the issue to the forefront in recent years is the emergence of significant changes in the economic environment, a few of which we may briefly examine.

The first of these is a growing dissatisfaction with financial statements and their ability to predict corporate failures. The appointment of the Cadbury Committee in the UK jointly by the accounting institutes, the London Stock Exchange and the body of financial journalists was primarily triggered by a series of spectacular and sudden collapses of several large publicly quoted companies. There was consequently a feeling that if something was not done, London would soon lose its pre-eminence as a financial centre and the UK accounting institutes would suffer considerable loss of prestige.

A second factor was the growing dissatisfaction with the role of independent directors on the boards of companies and the seemingly large remuneration paid to them. One journal in the US described directors as stars on a Christmas tree, purely decorative but otherwise ineffective. In September 1998, in a speech delivered at New York University, Arthur Levitt, the then chairman of the SEC, had some harsh things to say about corporate managements, auditors and the boards. This speech, which he titled ‘The Numbers Game’, was reported by one financial journal as “Lies, Damned Lies and Managed Accounting”.

He said that there was difficulty in holding the line on good accounting practices when competitors “operate in the grey area between legitimacy and outright frauds ... a grey area where the accounting is being perverted, where managers are cutting corners; and where earnings reports reflect the desires of management rather than the underlying financial performance of the company”. As a direct consequence of this speech, a Blue Ribbon Commission was appointed in October 1998 by the New York Stock Exchange and NASDAQ published in early 1999 the Blue Ribbon Committee Report. This report is largely the genesis of the role of the audit committees as we know them today.

A third factor was the emergence of the institutional investor. In the US, the first pension fund was established by General Motors in 1950, and by 1990, the funds available for investment by institutional investors had grown to over \$3.5 trillion. Thereafter, these funds have

been growing at the rate of \$1 billion to \$1.5 billion per year. In the UK, institutional investors account for over three-quarters of the value of the London Stock Market, and the 10 largest investors alone account for almost a quarter of the total market capitalization. In India also after the liberalization in 1991, we have seen the emergence of the private sector mutual funds which today have well over ₹ 100,000 crore of investible funds and foreign institutional investors who have portfolio investments of over \$25 billion.

There has, therefore, emerged a new class of investors who are knowledgeable, conscious of their rights, and willing to enforce them. In the US, the largest of the institutional investors, CALPERS, has devised its own model of the corporate governance code and it ensures that companies in which it has substantial holdings enforce this code. Again in the US, it is the institutional investors who have been at the forefront in demanding good corporate performance and have been instrumental in removing the CEOs of large corporations when they have failed to perform.

There is one other aspect of the emergence of the institutional investor that we must note. When a company does not perform, a shareholder has three choices. He can exit, he can voice his concern, or he can continue to show his loyalty to the company by continuing as a shareholder. The first of these choices is often not available to the institutional shareholder, often because the size of its holding is too large or because it is using index funds. Therefore, the institutional investor is often by compulsion a long-term investor who needs to voice his concern.

A fourth factor that needs to be recognized is the impact of economic growth. As a society becomes more prosperous, it becomes more knowledge based. There is, therefore, the emergence of a new breed of individual investors who are hungry for knowledge and who are concerned with ethical issues.

Finally, there is the competition between developing countries to acquire the largest slice of the international funds earmarked for

emerging markets and the growing realization that these funds will only go to those markets which are strongly regulated and which have an ethical base.

There is increasing evidence that institutional investors are putting corporate governance at the top of their agenda. An investor opinion survey by McKinsey in 2002 showed that institutional investors would pay a premium ranging from 12 per cent in the UK to 38 per cent in Russia for well-governed corporations. Equally interestingly, in June 2002, Moody's announced that it had incorporated corporate governance variables in its credit rating methodology. This then was the background in which the various codes of corporate governance were devised all over the world. Apart from the Cadbury Report in the UK and the Blue Ribbon in the US, perhaps the most important is the OECD code which covers the European Union.

In India, following upon the recommendations of the Kumaramangalam Birla Committee Report, SEBI required the stock exchanges to introduce in February 2000 in the Listing Agreement Clause 49 laying down a code of corporate governance which is currently in force.

The codes devised in various environments differ in detail but they are all focused on three fundamental issues, namely: (a) the composition of the boards of directors and the role of independent directors; (b) the composition and role of the audit committee; and (c) the communications to the shareholders including a management analysis and discussion statement.

The basic proposition is that the Board of Directors must direct and control the management and in turn must be answerable to the shareholders. The board must be independent of the management. Therefore, a majority of the directors must be non-executive. Moreover, while a director may be non-executive, he would not necessarily be independent. It is, therefore, necessary that there should be a minimum number of directors who are independent – one-third under clause 49 – and the number should be increased – half under

clause 49 – when the same individual combines within himself the role of Chairman and CEO.

Recognition is also given to the fact that the board can function more effectively if it has sub-committees to discharge its different functions. The most important of these is the Audit Committee. It is the primary instrument through which the Board controls the management and therefore it has wide responsibilities and it consists wholly of non-executive directors, a majority of whom are independent.

If the board is to be answerable to shareholders, then there has to be greater transparency in the information the board provides to the shareholders. Therefore, financial statements submitted to the shareholders have to be supplemented by other information that enhances shareholders' understanding of how the company has functioned during the year. This includes a report on corporate governance and, more importantly, a Management Analysis and Discussion Statement that examines the major factors that contributed to the company's financial performance during the year and provide better understanding on the same.

And then, in late 2001, Enron erupted, quickly followed by equally damaging disclosures in other large US corporations like WorldCom, Quest and others. These failures resulted in a significant erosion of public confidence in financial reporting and in October 2002, the International Federation of Accountants established a task force on 'Rebuilding Confidence in Financial Reporting', which submitted its report in July 2003. This report makes interesting reading.

It shows that Enron was not first case of reporting failure associated with governance and business failure. The 1980s and 1990s are littered with other examples of such failures and are not confined to the US. In the UK, there were Maxwell, BCCI, Polly Peck and Barings. In France, there was Credit Lyonnais, in Germany there were Metalgesellschaft and Schneider. In Australia there was AWA, in Canada there was Canadian Commercial Bank and in Japan there was Yamaichi.

Enron was not, as many believe, the event that initiated the changed perception of the reliability of financial reporting. It was merely the event that confirmed a trend that was developing and its sheer size gave it a greater visibility that woke up many persons to issues that had been significant for some time.

An added feature was a sense of public outrage that while the various stakeholders like shareholders, employees and pensioners lost large sums, those who ran the companies enriched themselves even while their businesses collapsed. An article in the September 2002 issue of *Fortune* magazine points out that while between January 1990 and May 2002, the stock prices of 25 companies fell by 75 per cent or more, the executives of those companies 'walked away' with \$23 billion.

Moreover, these failures have not stopped with Enron or WorldCom. In February 2003, the Dutch company, Royal Ahold, the world's third largest retailer, announced that its profits for 2001 and 2002 had been overstated by \$500 million, later increased to \$800 million. On the day of the announcement the company's share price fell by 63 per cent in a single day and declined to only 11 per cent of its level in late 2001. Ahold is often referred to as Europe's Enron.

Similarly in March 2003, the SEC accused Health South Corporation, one of the largest providers of healthcare services in the US, of overstating its earning between 1999 and the second quarter of 2002 by at least \$1.4 billion. Later this figure was increased to \$2.5 billion when two more years were added.

Currently, there are newspaper reports that there has been a massive misappropriation in Italy's food giant, Parmalat, and the 'hole' in accounts could exceed 10 billion euros (\$12.7 billion).

What went wrong? A number of possible causes have been identified which we may briefly consider.

An important cause was the pressure to perform, both external and internal. The external pressures arose mainly from the capital markets.

Managements were expected to meet market expectations of short-term performance indicators like earnings or revenue growth and financial ratios tied to debt covenants and other measures. A small shortfall in reported earnings, when compared to market expectations, could result in a significant drop in market capitalization and adversely affect ratings and access to capital markets and increase the cost of funds. Therefore, as Arthur Levitt put it, “Too many CFOs are being judged today, not by how effectively they manage operations, but by how they manage the street” (referring of course to Wall Street!).

The internal pressures arose because of board expectations but more significantly from the fact that a significant portion of the senior management’s remuneration was linked to operating and financial targets which were often overly optimistic. There was, therefore, an increasing temptation to resort to ‘creative accounting’ to replace through accounting jugglery what could not be achieved through operating results.

Another cause was the growing complexity and sophistication of business structures and transactions. Companies increasingly are resorting to complex financial instruments like derivatives or to structural financial transactions and intricate operating agreements and to organizations like special purpose vehicles (SPVs) to transfer assets and liabilities off-balance sheet while substantially retaining all the risks and rewards of ownership but without control. Enron provided a good example when it set up over 800 SPVs in the Cayman Islands to hide its problem assets, losses and liabilities and to generate bogus revenues.

Partly, the problem was one of pure greed or sheer incompetence. WorldCom is a good example. In June 2002, WorldCom announced that it intended its financial results for 2001 and the first quarter of 2002 to correct an inflation of income of approximately \$3.8 billion. It was later alleged by SEC that beginning with July 2000, WorldCom had, over successive quarters, reclassified ongoing operating expenses as capital expenditure to the tune of approximately \$9 billion.

Moreover, WorldCom is not the only example of technology companies capitalizing development costs to create the impression of profits. In the mid-1990s, QSP in the US did this with a vengeance and eventually went bust.

While the major culprits identified were corporate managements, independent directors and auditors, other intermediaries were also indicted.

In a speech in February 2002 at a conference of the Federal Bar Council, Harry Pitt, the then chairman of SEC, referring to Enron said, “Enron teaches us it is inappropriate for corporate lawyers to assist clients in finding ways to evade legal requirements or disserve the public interest even if those results can be achieved in a manner arguably within the literal letter of the law.”

There has also been a criticism of the role of merchant bankers. In May 2003, the SEC announced that it had sued Merrill Lynch and four of its former senior executives for helping Enron commit securities fraud in the Enron case, and Merrill Lynch had offered a settlement of \$80 million which SEC had accepted.

Enron and the disclosures that followed have given a new impetus to the concept of corporate governance. The lead in this matter was taken by the Sarbanes-Oxley Act in the US and that model has been largely followed in other countries. In India, the Department of Company Affairs appointed, in August 2002, the Naresh Chandra Committee, and in November 2002, SEBI appointed the N.R. Narayana Murthy Committee. The terms of reference of the two committees overlapped in a number of areas of corporate governance.

The main areas highlighted in Sarbanes-Oxley Act and the reports of the two committees are as follows:

- (a) Strengthening the definition of the independence of the Audit Committee
- (b) Widening the role and responsibilities of the Audit Committee

- (c) Imposing direct responsibility on the CEO and CFO for the fairness, completeness and truthfulness of financial statements
- (d) Giving greater importance to the responsibility of the Board and the Audit Committee for the adequacy of risk management procedures
- (e) Imposing an obligation on companies to have a code of conduct and 'whistle-blowing' procedures
- (f) Strengthening the independence of auditors
- (g) Improving oversight of the subsidiary companies
- (h) Increasing scrutiny of related party transactions

Some of these may be examined.

There is a growing realization that the agency problem requires that there must exist a system of checks and balances between the management, the board, the majority shareholders and the minority shareholders. An essential feature of this system is the existence of independent directors. It is very difficult to define an independent director because independence is largely a state of mind. The Birla Committee definition, which is part of the present clause 49, says that a director is independent if he does not have a material pecuniary relationship or transactions with the company which, in the opinion of the board, affect his independence. This definition is now sought to be widened by covering relationships of the company with relatives of directors, promoters and top management, and excluding former employees of the company, prior partners or employees of audit firms, and to attorneys and consultants who have a significant relationship with the company, and persons holding two per cent or more of the capital.

But directors have to be independent not merely in form but also in substance. In this connection, it is necessary to recognize that independence can be impaired in various ways. For example:

- (a) The role of the Chairman and Managing Director. A study of the corporate scandals of the recent past has shown that strong CEOs have exerted a dominant influence over boards, making it difficult for independent directors to play a central role in the oversight function. There is, therefore, a strong case for the role of Chairman and Managing Director to be exercised by separate individuals and not by a single individual. In the UK, over 90 per cent of listed companies have effected this separation.
- (b) The influence of the dominant shareholders represented on the board. This is clearly visible in the case of multinational companies, PSUs and family-controlled companies.
- (c) The knowledge, competence and maturity of the independent director. A director may be independent but he will not be effective if his contribution is not appreciated by other board members.

Of all committees of the board, the Audit Committee is pivotal. It represents the bridge between the internal and external auditors and the board, and is most effective when it is composed of independent directors who are financially literate and who meet and interact without the presence of management. The responsibilities of the Audit Committee have been greatly expanded. It is required to review all financial data before it is published and has responsibility to ensure compliance with risk management and code of conduct and to review the financial statements of subsidiaries and related party transactions. In discharging these and other functions, the Audit Committee will have to maintain the right balance between control and interference. It cannot afford to adopt an adversarial role with the management as that may conflict with the other basic objective of corporate governance, namely, the enhancement of shareholder value.

The events of the last few years have also shown that there were few irregularities that were not within the knowledge of the CEO and CFO. It is, therefore, necessary to ensure that the primary responsibility for the preparation of the financial statements and for the disclosures of irregularities is cast on these individuals.

While initially corporate governance concentrated on the need for internal control, it increasingly recognized that internal control is only one aspect of risk management. The emphasis has, therefore, shifted to the identification of risks to which the organization is exposed, the manner in which those risks are addressed, and the monitoring of the risk control mechanism.

Experience has also shown that a major challenge for corporations and their leaders is to create a corporate culture that promotes ethical conduct on the part of the organization and its employees. There are three aspects of this challenge that need to be addressed.

- (a) Firstly, there is the need to create 'tone at the top'. Ethical conduct has to be demonstrated by the board, the CEO and the top management.
- (b) Secondly, there has to be a well-formulated Code of Conduct that is communicated to and which must be understood by all employees.
- (c) Finally, there must be adequate 'whistle-blowing' procedures. Most of the financial scandals that have surfaced have been detected only because of the information given by employees who have been troubled by unethical conduct. Therefore, there is need for a mechanism by which unethical or illegal conduct or abuse of the prescribed code of conduct is communicated to senior management or, if the senior management is involved, to the Audit Committee; that the existence of this mechanism is known within the organization; and most importantly, that there are provisions for non-victimization of the informer.

To strengthen the independence of the auditor, a number of provisions have been suggested. These cover the prohibition on the auditor rendering services which compromise his independence and the mandatory rotation of the audit partner. There was also a suggestion of rotation of audit firms. This has been rejected by the Naresh Chandra Committee; in the US the issue was referred by the Senate

to the General Accounting Office (GAO) for examination. After a study made between November 2002 and November 2003, covering a survey of 1,171 chairpersons and other stakeholders and regulators, the GAO has reported that the cost of rotation would exceed the benefits, that there is a risk that audit independence and ultimately audit quality will be adversely affected, that selection and support costs of companies would increase, and their choice of auditors would get restricted.

A study of major corporate frauds and failures in recent times has highlighted the fact that powerful CEOs have formed subsidiaries which they have controlled through boards which consisted only of the company's officers and the operations of these companies have been kept wholly outside the scrutiny of the main board. It is, therefore, being provided that there should be some minimum mechanism whereby the operations of the subsidiaries are subjected to scrutiny by the main board. These include review of financial statements, presence of independent directors and placement of minutes of the boards of the subsidiaries before the main board.

There are also proposals for better oversight by the Audit Committee of transactions with related parties. Transactions in the normal course of business, in summary form, and transactions which are not in the ordinary course of business, individually, have to be placed before the Audit Committee. In addition, all transactions, whether with related parties or not, which are not on an arm's length basis, have to be placed before the committee with a justification for the transaction.

It has sometimes been suggested that the Anglo-American model of corporate governance is not suitable to Indian conditions because most Indian companies are family owned. It is interesting to note that over 80 per cent of business in the European Union and the US are family-run. In Italy the figure is as high as 99 per cent [according to Nancy Upton and William Pretty, writing in *Venture Capital*, 2000]. Some 40 per cent of the US S&P 500 is family-run firms [according to *Family Business Magazine*, University of Notre Dame and IMP Institute].

In fact, family-run corporations are exposed to certain challenges that can be addressed by corporate governance. The biggest challenge is succession as it nurtures an 'insider-only culture'. In the UK, only one in six family-run firms survives to the third generation and only one in eight to the fourth generation [according to the *Family Business Review*, 2001]. Other challenges are accessing capital and diversifying wealth. In consequence, family-run businesses invest far more of their own funds in the business than they should. Good corporate governance helps in overcoming these challenges.

It is also a mistake to consider that corporate governance is an issue that concerns only the company and its shareholders or perhaps its other internal stakeholders, such as employees.

The corporate form of organization has been the spearhead which has made it possible to attract capital, organize labour, fund the development of technology and establish efficient manufacturing and distribution systems which have significantly improved quality of life for most persons. Sustaining confidence and trust in the system is, therefore, a matter of enormous public concern.

Trust is an essential ingredient of any functioning financial market. Good corporate governance, therefore, needs to be involved with norms, processes and behavioral patterns. It needs to provide the necessary assurance that investors and other stakeholders can rely upon the information that is provided by the corporation. It also provides other direct benefits to the corporation. It improves strategic thinking, rationalizes the management and monitoring of risk, limits the liability of the directors and top management and has a long-term beneficial reputational effect both within and outside the organization.

Good corporate enterprises recognize that they have an obligation to society and seek to discharge the obligation in a variety of ways. This includes protection of the environment, support of social causes and

setting an example through ethical conduct. Quite apart from the benefits to society, the reputation of an ethical organization provides benefits to the organization itself through a more acceptable market image, ability to attract talent and pride amongst its employees.

It is also necessary to recognize that it is not sufficient to articulate and lay down a code of corporate governance if a mechanism for its enforcement is also not created. The vigour with which the state has moved in the post-Enron era in the US provides a good example that needs to be emulated. In the US swift action has been taken and punishment meted out to all those who have been involved in financial misdemeanors. For example:

- (a) A penalty of \$1.5 billion was sought to be imposed on WorldCom and it has been settled for \$500 million. This is in addition to civil actions taken against four senior officers.
- (b) Suits have been filed against the former CEO of Enron seeking disgorgement of all ill-gotten gains including compensation, civil money penalties and debarment from acting as director or officer of a publicly held company.
- (c) The Sarbanes-Oxley Act provides for significant protection for 'whistle-blowers'. This includes job protection, a requirement that publicly traded corporations and their auditors and attorneys engage in ethical behaviour, obligation on corporate attorneys to make specified disclosures, and the possibility of criminal action against erring officers.

Finally, it is necessary to recognize that the code of corporate governance is only one of several measures including accounting standards, disclosure norms, take-over code, restriction on insiders trading, etc., which SEBI as the regulator has taken to 'ring-fence' the operations of corporations to ensure orderly market conditions.

The systemic risk arising from individual corporate failures cannot be underestimated. This has been well illustrated in the recent past. The Asian crisis in 1997 originated in Thailand and Indonesia but the contagion soon spread to other countries in the region. Though it had

many other causes like high level of debts, corrupt lending politics, non-market criteria for credit allocation, inadequate monitoring, etc., many believe its effects would have been less severe if there had been confidence in corporate governance and financial transparency in the corporations.

Similarly, Enron did not merely destroy a corporation. It destroyed Arthur Andersen, a blue-chip accounting firm of 85 years' standing with 85,000 professional staff spread all over the world, and its ramifications were felt in financial markets and in regulatory changes throughout the globe.

In the final analysis, corporate governance is not a mere matter of structures and procedures. It has to be a way of life. In a sense, the issues it addresses in the corporate world are not different from the issues that society addresses in a functioning democracy, that those to whom the assets of the corporation are entrusted for management are accountable for those assets and for the manner in which they manage them, and an assurance that no part of the assets have been diverted for personal gain; that there is adequate transparency in the manner in which these managers communicate this accounting to the shareholders and that this accounting is subjected to adequate scrutiny and the shareholder is entitled to rely upon the truthfulness of his accounting; and finally that the rights of every individual shareholder are protected and there is no oppression of the minority by the majority.

In a wider sense and in a different context, these are the very causes that Nani Palkhivala so vigorously defended throughout his life.

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*Y.H. Malegam was President of ICAI during 1979-1980 and Chairman of the National Advisory Committee on Accounting Standards. He has served as member and chairman of various national and international bodies in the field of accountancy, finance and economics. He was awarded the Padma Shri in 2012.*

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# **The Diabetes Epidemic: Why, and What We Can Do**

**Prof. V. Mohan**

October 10, 2004

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Diabetes, characterized by elevated blood sugar levels, is one of the leading causes of death and disability worldwide. The devastating disease can affect nearly every organ system in the body. It can cause blindness, lead to end-stage renal diseases, increase the risk for strokes, heart attacks and amputations due to loss of sensation (neuropathy) in the foot and decreased blood circulation. According to the World Health Organization (WHO), diabetes now affects more than 171 million people worldwide, and this is expected to rise to 366 million by 2030. Unfortunately, developing countries like India would contribute to the bulk of this increase in numbers of diabetic patients, and more unfortunately, the disorder is becoming more common in young people.

## **The Indian Scenario**

According to recent WHO statistics, India already tops the world with the largest number of diabetic subjects in 2000. Some 31 million individuals in India had diabetes and this is projected to increase to nearly 80 million, that is, a rise of 160 per cent by the year 2030. This

means that by that time, India will contribute more than 20 per cent of the total diabetic population in the world. Further support for the [statistics pertaining to the] rising prevalence comes from the recent results obtained from two major studies – Chennai Urban Population Study (CUPS) and Chennai Urban Rural Epidemiology Study (CURES) conducted at the Madras Diabetes Research Foundation, Gopalapuram, in Chennai.

In the CUPS study, which was conducted in the year 1997, 12 per cent of individuals above the age of 20 years were found to be affected by diabetes. A more recent CURES study, conducted on a 26,001 representative sample of Chennai, showed that 16 per cent now have diabetes in Chennai. This is in sharp contrast to the 2 per cent prevalence of diabetes reported by the Indian Council of Medical Research (ICMR) in the 1970s. In addition, in the CUPS study, 1.3 per cent of the individuals below the age of 25 years either had diabetes or pre-diabetes, while this number was 3 per cent in the CURES study, indicating that diabetes has become a newly emergent threat to youngsters also.

### **What Are the Reasons for Diabetes Escalation in India?**

Despite the diversity within India, a number of common themes can be found with regard to patterns of diabetes and rising prevalence rates. In addition to genetic component, increased insulin resistance, increased longevity and environmental factors, particularly urbanization including epidemiological transition, physical inactivity, and obesity and dietary alterations are the causes for the exploding epidemic of diabetes in India. Among these factors, rapid epidemiological transition due to affluence and lifestyle changes seen in developing countries coupled with genetic factors is thought to contribute to the acceleration of the epidemic. Due to epidemiological transition, India is facing a rapid increase in mortality from non-communicable diseases like diabetes, cardiovascular disease, obesity, etc., at a time when infectious and parasitic diseases are declining as causes of mortality. This points to the role of rapid change in the environment.

At present, 30 per cent of India is urbanized in contrast to 15 per cent in the 1950s, and 15 years from now, over 50 per cent of Indians will live in urban areas.

Socio-economic development over the last 40-50 years has resulted in a dramatic change in lifestyle from traditional to modern, leading to physical inactivity due to technological advancement, affluence leading to consumption of diets rich in fat, sugar and calories, and a high level of mental stress. All these could adversely influence insulin sensitivity and lead to obesity. A sedentary lifestyle, one of the contributory factors for diabetes, increases the risk for diabetes. Furthermore, it is also observed that family history is a risk for diabetes. Diabetes is 5-10 times higher in obese people than in those of normal weight. While genetic (hereditary) factors are beyond one's control, lifestyle modifications can definitely help in lowering diabetes.

### **Prevention Strategies**

Being a multifaceted disorder, diabetes affects every organ of the body and can particularly damage the eyes, kidneys, heart and feet. Unfortunately, many people do not discover that they have diabetes until they develop serious complications that substantially increase the morbidity and mortality associated with the disease and reduce quality of life. This would lead to a huge rise in the direct and indirect costs connected with the disease both to individuals and family members thus making it mandatory to start prevention methods for diabetes in our country in order to curb its increasing prevalence.

Though diabetes is an inherited disorder, behavioural changes can help in its prevention. There are three points in the natural history of the disease where prevention is possible. Primary prevention targets patients by early diagnosis through screening programmes; secondary and tertiary prevention are done by providing quality care. Primary prevention of diabetes refers to the prevention of diabetes before it develops. Primary prevention of diabetes should begin in childhood or early adulthood and risk reduction education should be directed

at the entire family. All patients should be regularly screened for risk factors and encouraged at each healthcare visit to pursue a healthy lifestyle, including a healthy diet, adequate exercise and weight control.

Secondary prevention of diabetes refers to prevention of complications in those who are already diabetic individuals. Subjects with diabetes should be managed more aggressively to prevent the occurrence of complications. Tertiary prevention of diabetes aims at limiting physical disability and rehabilitation measures in those who have already developed diabetic complications and to prevent them from going into end-stage complications of diabetes.

Primary prevention of type 2 diabetes will require measures to promote physical activity and reduce obesity in adults and children, alongside programmes to achieve healthy fetal and infant growth. Considering that Indians appear to be generally more insulin-resistant, it would be prudent to advise a healthy lifestyle across the different geographic regions and age-groups, continue traditional diets and possibly adopt stress reduction by yoga or other measures.

Traditional dietary patterns (consumption of foods rich in fibre) are disappearing as Indians are adapting themselves to living in the more industrialized, urban environments that are brought about by globalization. The major dietary changes that urbanization and affluence bring about are substitution of unrefined wheat, rice or millets by highly polished wheat or rice and increased intake of sugar and fat especially in higher income groups. Thus, appropriate dietary management of diabetes includes reduced intake of total calories, inclusion of coarse cereals, complex carbohydrate and frequent low glycemic food choices, modified fat both in quantity and quality, generous use of vegetables, pulses and sprouts, and adequate dietary fibre consumption.

Increased physical activity is perhaps the most important step in the prevention of diabetes. Increasing physical activity helps in losing

weight, which in turn improves glucose tolerance. The Diabetes Prevention Programme (DPP) conducted in the US has shown that a seven per cent weight reduction by exercise and diet can reduce the occurrence of diabetes by 58 per cent. The benefits of exercise are far-reaching as it not only helps prevent and control diabetes but also helps to reduce weight, strengthen the bones, muscles and joints, improve blood circulation, enhance functional capacity, and reduce stress, anxiety and depression, thereby promoting social interaction and integration. Stress reduction can be achieved through meditation, exercise, counselling, recreational activities and proper planning and time management.

Therefore, the five steps to be adopted in preventing diabetes are increasing intake of healthy diet, increased physical activity, maintaining ideal body weight, reducing stress and screening at regular intervals. Such an effort is urgently needed to tackle the explosion of diabetes and lower the burden due to the disease in India.

To prevent diabetes some key messages to the public are:

- Diabetes is preventable
- Catch diabetes early by regular screening
- Fatness is not fitness
- Eat less
- Walk more
- Prevent diabetic complications

A long and happy life is possible despite diabetes.

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*V. Mohan (b. 1954) is a diabetologist. He is Chairman and Chief of Diabetology at Dr Mohan's Diabetes Specialities Centre which is a WHO Collaborating Centre for Non-communicable Diseases Prevention and Control and an IDF Centre for Education. He is also President and Director of the Madras Diabetes Research Foundation, Chennai.*

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# **Mindset to Succeed in a Globally Competitive Economy**

**Raghuram G. Rajan**

January 13, 2005

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At the outset, let me state that my talk is not meant to represent the views of the International Monetary Fund, its board, staff or its member countries. However, I do represent them all when I express the Fund's deepest sympathy to the people and governments in this region for the tragic losses suffered on the 26<sup>th</sup> of December. As the Managing Director has said, the Fund will provide whatever assistance it can to the affected countries in this difficult time.

I did not have the privilege of meeting Nani Palkhivala, but every citizen of India has been affected in some way by his life's work, and owes him a debt of gratitude. Born in 1920, Mr Palkhivala was not only a jurist of the highest calibre, he was also a tireless champion of constitutional liberties, of human rights and individual freedom, and economic freedom. One of the strongest supports to the rule of law and to limits on the executive is the Constitution. Nani Palkhivala understood that if the Constitution could be changed as easily as a Municipal Licensing Act, it would have no meaning. By strengthening the Constitution, Keshavananda Bharati created a

strong framework within which the Indian state had to operate. Nani Palkhivala fought the Keshavananda Bharati case that established the principle that the Indian Parliament cannot alter the basic structure of the Constitution. This, by itself, would be enough to enshrine him as a founder of modern India. But, he did much more. He stood up to the Emergency, one of the few voices raised against authoritarianism when the very character of India's democracy was in question. Because public speeches were prohibited, students used to go around with taped versions of Palkhivala's speeches protesting the Emergency and play them in private meetings. And recognizing that political and economic freedoms go hand in hand, in his regular post-budget speech, he enthralled thousands with his views on the economic policies of the country.

Mr Palkhivala was a lone voice against the socialism practised in India, arguing that it was a fraud – transferring wealth from the honest rich to the dishonest rich. Instead, he championed free enterprise. It bears remembering that he was chairman of TCS, one of the brightest stars of the new Indian economy today. No wonder C. Rajagopalachari once called him “God's own gift to India”.

Towards the end of his life, Nani Palkhivala soured on the Indian experience. In a speech in Australia, dejected by the leak of the IIT entrance exam papers, which reflected the demise of yet another once-sacrosanct institution, he said, “I do not think India, in its entire history of 5,000 years, has ever reached a lower level of degradation than it has reached now.” But in that speech, he also said that India always seemed to find a way of coming out of the morass. If Palkhivala read today's newspaper, I suspect he would have been outraged at the selective leak of a confidential police interrogation to a TV network, but also he would find many other reasons for hope. Certainly, the world seems to think so. India fever has caught on in the world's investment community. Nowadays, the western press rarely mentions the growth miracle, China, without adding “and India”. In an admittedly unscientific test, a Google search reveals over 10 times more references linking ‘India’ and ‘China’ than ‘India’ and ‘tiger’,

and 100 times more than ‘India’ and ‘maharaja’. But amidst all the hoopla, it is well worth asking: Has India really overcome the shackles of the past and is it ready to play a central role in the global economy? Instead of going through the familiar litany of our strengths and our weaknesses, I thought it would be useful to pose the question in a different way: Does India have the mindset needed to be a successful player in a globally integrated economy?

Mindset is a difficult concept, even more so when we speak of the mindset of a nation. But it does seem that there are times in the life of nations when they feel confident that they can take on the world, that they are capable of meeting any challenge, achieving any dream. If properly channelled, such a spirit can be an enormous aid to growth. In fact, some sociologists argue that such a spirit, a national ‘*atma vishwas*’ (self-confidence) so to speak, is critical to the kind of explosive growth that we saw in Japan in the 1950s and 1960s, in Korea in the 1970s, and in China today. (See, for example, *The Spirit of Capitalism* by Liah Greenfeld, Harvard University Press, Cambridge, MA.) It is the spirit that moved South Korea from having a per capita income on par with India’s to the ranks of the OECD in just four decades, the spirit that built a sleek futuristic city in Pudong, Shanghai, out of an area that was largely farmland just a decade ago, and the spirit that is currently building the New Delhi metro to world standards and on time. It is the spirit that asks “Why not” instead of “Why”.

One reason such a mindset is important is that it creates intolerance for laziness, for shoddy products, for open corruption, and for the usual excuses. When people have a strong conviction that they can achieve the possibilities of the future, it makes them less tolerant of impediments on their way to it. It also makes generations willing to sacrifice their present, even working themselves to death – a phenomenon that in Japanese has its own special word, ‘*karoshi*’.

There is, however, another reason for the confidence to open itself up to the world, to take advantage of outside opportunities no matter where they arise, to use the cheapest resources no matter where they

are produced, to hire the best people no matter where they were born, and to face the fiercest competition no matter what its origin. Such confidence is necessary if India is to succeed in a globalized world. Clearly, some segments of our society possess this mindset, but do we have it as a collective, and if not, what do we need to do?

In some ways India is well prepared to have such a mindset. It is a multi-cultural, multi-ethnic society with a vibrant democracy and a free press that readily exposes shortcomings. The highest elected office of the country is open to anyone who consciously opts for Indian citizenship, not just to those who are unthinkingly born into it. All this reflects a willingness to assimilate, and work with, that which is foreign in the broadest sense of the term.

Some of our corporations also demonstrate this: large corporations like Tatas or Infosys now have a global presence, reflecting the emergence of the Indian multinational. But it is not just the large corporations that are spanning borders – technology has made it possible for small firms to do so. Heymath, a firm in Chennai started by some friends, provides mathematics homework help to students, and lesson plans to teachers, over the net. Essentially, its employees in Chennai use the internet to discuss and prepare electronic charts and demonstrations for teachers, while also providing hints and sometimes solutions for students who are stuck. Its initial target market was schools in Singapore, but after successfully developing and selling its product there, it is now expanding elsewhere, including in India. Though small, the firm is truly multinational, using consultants from Cambridge University and IIT Madras, management born in India but trained in the West, employees from Chennai, a knowledge base informed by math curricula of different countries, and customers from around the world.

Despite these examples, however, as an economy we are still not as open to foreign goods and services, labour or knowledge as we should be. On the IMF's trade restrictiveness index, India has a score of 8, which places it amongst the most restrictive countries. India's

GDP accounted for 1.6 per cent of world GDP in 2003 but its trade accounted for only .94 per cent of world trade. (The estimate is based on 178 countries and World Economic Outlook data for 2003.) And it holds the dubious record of instigating the maximum number of anti-dumping cases under the WTO in the period between 1995 and 2003. From 1995 to 2003, India has initiated 379 cases (15.69 per cent) of a total 2416, well ahead of the US (329 cases, 13.6 per cent) or the European Union (274 cases, 11.3 per cent). India's capital account is still closed. It still places restrictions on foreign entry and participation in various areas of the economy, even those that have little implications for national defence.

Just to elaborate on this last point, India's restrictions on inward and outward investment defy economic logic. For instance, India allows foreigners to partner domestic firms in starting airlines but only if they have absolutely no experience running airlines. At the same time, we have proposals on the table for domestic airlines to fly abroad, but only if they have a minimum number of years of experience and an established track record. Read at face value, our Government is far more solicitous of the safety of foreigners, who have to be protected from flying inexperienced airlines, than Indians, who will be served up as guinea pigs for inexperienced foreigners. Reading between the lines, such regulations are simply protecting the incumbents against external and internal competition. I leave you to judge how you want to interpret these regulations, but either way, Nani Palkhivala had it right when he said "We are not poor by nature but poor by policy".

Why is India so closed? The facile explanation is that we still remember the colonial experience, that some Indians see the process of opening up as a new colonialism by foreign multinationals, encouraged by a fifth column of neo-liberal Indian economists. Yet there is a big difference between a monopolist colonial power and multinationals, and that is competition. Competition keeps any single multinational from getting overly powerful, either economically or politically. There

is no credible evidence that foreign firms have conspired together to exploit India or that they have misbehaved any more than similarly placed Indian firms.

I do not want to imply that individually they have all been without blemish. The Union Carbide scandal did do tremendous damage to the image of multinationals in India. The point I am making is not that multinationals are free of bad management practices, but that they are not likely to be any more guilty than domestic firms. Nationality does not make management more or less ethical. In fact, the chairman of Union Carbide India at the time of the disaster was Indian. One might even argue that their presence in countries with stronger labour and environmental standards subjects multinationals to pressures that force them to raise their standards even in countries with weak standards. The main problem with Union Carbide apart from negligent management was that it may not have applied the same safety standards in India as it did elsewhere.

Despite the rhetoric, India seems to recognize this. In that most revealing of markets, the Indian marriage market, having a job in a multinational has always been seen as a plus – almost on par with being in the IAS. This would not have been the case if multinationals were suspected of dark and dire deeds. Similarly, openness has not made us slaves of a foreign culture. True, we see more western influences on the streets of Chennai today than 20 years ago. But it is also a fact that the music season in Chennai is as vibrant as ever and many of the youth in Chennai feel equally at home with NSYNC as with Thyagaraja, with cheese pizza as with idli-dosa. Globalization allows cultures to learn from each other, a no-no for the purist, but welcomed by the rest of us. Today pressures from developed country consumers and the press force multinationals to enhance their labour and safety standards the world over, thus elevating standards in poor countries. Carried too far, such pressures can be a form of protectionism that hurts poor countries, but in reasonable doses, they can be good.

My sense is that the reason India has not been open reflects other fears than dislike or mistrust of the foreigners. This is, in some ways, good news for it would be far harder to have a mindset to succeed in a globalized world if India were intrinsically xenophobic. But what else could explain how closed India is?

One explanation is the lack of confidence of our entrepreneurs. Till recently, our entrepreneurs shielded by protection against domestic and foreign entry, felt they simply could not compete against foreign firms. Protection not only renders the beneficiaries lazy and inefficient, it also gives them less incentive to rectify distortions and inefficiencies in the system. Our corporations could not care less that finance was so costly during the Licence Permit Raj for the costs could be passed on to consumers. But when talk turned to liberalization, they argued they could not compete against foreigners who had access to much cheaper finance. And they are not unique in such complaints. An analysis of attitudes towards competition across the world shows that entrepreneurs are far more likely to oppose liberalization when their financial system is relatively underdeveloped.

To summarize then, foreign firms especially multinationals are not intrinsically bad. Yes, there are a few bad apples, but not necessarily more than amongst domestic firms.

Two factors have been particularly important, I believe, in helping us break out of this vicious cycle where the lack of competition bred corporate indifference towards the efficient provision of factors like power and finance, which in turn reinforced resistance towards liberalization. First, companies like Infosys, TCS and Wipro showed that it was possible for Indian firms to compete effectively on the world stage and that the profits from doing so were enormous. Second, creeping liberalization, initiated by crisis but then gaining a momentum of its own, forced competition on the rest. When challenged to improve productivity, Indian firms found that despite the inefficiencies of the system, there were unique sources of Indian comparative advantage, even in manufacturing. A few years ago, we

feared Chinese imports would swamp the motorcycle market. Today, I see Bajaj Auto sells over a million motorcycles and expects to export 1,60,000 units this year. Our corporations have come a long way and many are ready to make India a hub for globalization.

If so, what still keeps India a relatively closed economy? One is the politician, aided or abetted by the bureaucrat. Not only are foreigners much harder to control but also they do not vote, so they are an appealing lot to discriminate against. But India is not special in this regard – whether it be Nordic politicians resisting the takeover of their banks by other European banks or French politicians creating national champions or US politicians complaining about outsourcing, politicians the world over, with a few notable exceptions, find it convenient to rail against openness.

But politicians do not act in a vacuum. They are particularly effective when they cater to strong constituencies. With large corporations becoming more open-minded, so to speak, could it be the people who are against competition?

On average, and with the caveat that cross-country comparisons are fraught with difficulty, the answer is no. Amongst all countries surveyed in the World Values Survey, Indians and Chinese are amongst the most pro-competition. But averages conceal some important patterns. Across countries and correcting for other factors, richer people are typically more strongly for competition. In India, they are not. Indian farmers and agricultural workers, especially those who are not owners, tend to be against competition, constituting yet another powerful political constituency against competition in India. Finally, across countries, older people are much more pro-competition than the young, reminiscent of a famous remark by Winston Churchill: “If you are not a liberal at 20, you have no heart, if you are not a conservative at 40, you have no head.” Yet in India, older people tend to be against competition, perhaps reflecting the strength of our socialist past rather than their lack of grey cells. Of course, these are averages; this does not refer to any of you in the hall. By coming

to this talk, you have already signalled that you are open-minded in spirit. In addition, that many of our politicians are rich, from rural backgrounds, and older, allows these constituencies to be particularly influential.

But even here there is reason for hope. First, more and more of India's young are reaching working and voting age, unencumbered with the baggage of the past, and sending more of their kind into Parliament. Perhaps more important, education makes people more tolerant of competition – human capital equips people with a chance in a more competitive world. India is no exception here. So a second reason for hope that people's attitudes will change is that as the population becomes better educated and more skilled, we will be more tolerant of competition in general, and openness in particular.

Let me now turn to policies with which an enlightened government can enhance the constituencies for openness and liberalization. The point emerging from the above discussion is in many ways obvious: the more prepared people are to face competition, the more tolerant they will be of it.

Three key steps are, therefore, first, expanding access to, and improving the quality of, education; second, improving access to finance; and third, creating more ownership and infrastructure in rural areas. It is heartening that the Indian government sees these as priorities, but it should resist the temptation to use tried and discredited methods like simply pouring money into education without tackling difficult issues like teacher incentives and parental involvement, or mandating wider lending by public sector banks without improving incentives and systems for credit evaluation and loan recovery. Yesterday, I visited a slum in Chennai where a microfinance group has been lending. Each borrower has been getting ₹ 2,000 or so to buy vegetables, blouse pieces to sell after a day's work as a housemaid. None of them has ever set foot in a public sector bank and none of them said they could. Now, lending to these people is costly, so these groups have to charge high rates. The government can be particularly valuable if it focusses

on an enabling role – setting standards and ensuring adequate supervisory, legal and regulatory infrastructure, while also encouraging the competitive private sector provision of these services. What does Government do? Limit rates, kill lending. Instead of limiting interest rates by fiat, thus ensuring microfinance has a hard time taking off, it is better to create a consumer support infrastructure to prevent abuse. Market enablers are better than interventions. Returning to the main point, not only will tariffs naturally be brought down as the constituencies for competition grow, they will not be replaced by hidden non-tariff barriers. We will become a truly open economy, which will enhance our ability to compete in the globalized world by reducing our costs.

Some people get concerned at this point. Why should India open up if the developed world still discriminates against agriculture? After all, are those subsidies and tariff barriers not discriminating against our farmers who account for a majority of the population? The answer, of course, is India should continue fighting, as do organizations like the IMF, for an elimination of tariff barriers and export or production subsidies in developed countries. But putting restrictions on our trade hurts us, independent of what the rich countries do. By increasing the cost of doing business, barriers to imports hurt our competitiveness and also increase prices for consumers. By insisting that rich countries liberalize before we bring down trade barriers, we are merely shooting ourselves in the foot. As Gandhi said, “An eye for an eye only makes the whole world go blind”, and it is as true of trade as of revenge.

All this is not to say there is no role for direct policy change. For example, if India is to be a global centre for financial services, it needs capital account convertibility, allowing ordinary people to invest abroad at will. But it cannot open its capital account without risk until the deficit is contained. Many other policies, such as reorienting bank credit towards the private sector or developing effective monetary policy tools hinge on deficit containment, so its importance cannot be overemphasized.

Competition will mean ups and downs – no longer will people be able to expect job for life, but they have to expect that occasionally the firms they are working for will go out of business, or their jobs will become redundant. The best way to prepare people for such change is to let them experience increasing amounts of it. The rush by the government to fix prices that have moved up rapidly, to shore up interest rates that have fallen ‘too far’, to bail out unviable firms with special ‘technology enhancement’ fund, and to bail out unviable banks by merging them with healthy ones reflects a government that is an insurer of first resort rather than an insurer of last resort, a government that does not prepare the people for change. And all too often, it is the vocal and the politically well-connected that get the manna from the government rather than the truly needy.

Thus far, all this largesse has been buried in a mounting deficit, and a government debt. The fiscal deficit is the soft underbelly of the Indian state where the sum total of our lack of political backbone in taking hard decisions is reflected. The fiscal deficit is important since ultimately, the piper will have to be paid, and the bill will be paid out of the pockets of the honest taxpayer. We have to change this system – in a globally competitive economy, there is no such thing as a free lunch.

A better form of insurance is flexibility. We need to build more flexibility into the economy so that it can react to inevitable change quickly. India has too much preservation, and too little creation or destruction. Interestingly, studies show the way to get more creation of new businesses is to allow easier entry as well as easier exit or destruction. This means reducing the many petty bureaucratic barriers to entry, as well as more flexible labour laws, and a better and more rapidly enforced bankruptcy code.

Increased corporate flexibility will inevitably force individuals to bear losses – for example, workers who lose their jobs as the economy changes. We should make it easier for the worker to be able to learn new skills – all the more important to invest in education. But for

those who cannot adapt, we need to find better ways to cushion them, especially because old social support networks like extended family and the village tend to erode in the modern market economy. As India modernizes, it has to create an explicit safety net, including unemployment insurance, pension schemes, and healthcare, targeted at the individual worker to shield him or her from business cycle fluctuations. In doing so, it should learn from the experience of other countries on how to avoid killing incentives for work or expanding programmes beyond the ability of the country to pay for them.

Finally, people will be far more willing to accept competition if they are given time to adjust and if they are convinced the government will use that time to improve their ability to compete. A time-bound phasing-in of competition and a phasing-out of protections and subsidies may find far greater acceptance than shock treatment.

Thus far, I have spoken about what it will take for India to be more welcoming of foreign business. But we also need to think about what will make foreign business more interested in India so that our economy continues to attract the investment it needs to be competitive. Here again, the short-term approach would be to ply them with tax breaks and financial guarantees. Apart from the fact that these are addictive and create a constituency for their continuance, they also tend to discriminate against domestic firms. This then creates perverse incentives for domestic firms to take capital abroad, have it ritually cleansed and certified, and then brought back home to avail itself of the breaks.

A better way to draw in foreign investors is to treat them as one would domestic investors, and deal with all the economic domestic investors have. Foremost amongst these, in my opinion, is policy uncertainty. All too often in the past, policy has been hatched by theoretical bureaucrats, remote from the polluting influences of business reality. When the policy with all its clauses and sub-clauses is eventually rolled out nationwide after much discussion within a small but out-of-touch group, it quickly fails the market test. And because little consensus

on it has been built amongst business groups or political parties, it immediately creates uncertainty about when it will be changed and by how much.

It is a welcome sign that the authorities are encouraging more open debate about policies before enacting them. It would also help to experiment with different approaches on a small scale to see what works, or to have an initial phase during the rollout when changes will be made, before setting the policy in stone. Clearly, policies that specify general principles rather than attempt to micromanage will have more success in withstanding change.

In addition to certainty in policy, foreign investors also value transparency in decision-making, more so than large domestic investors because foreigners are less familiar with the corridors of power. Everything cannot, and even should not, be laid out in clear rules, but where discretion is relied upon, the decision-making process should be seen as fair. Regulatory and supervisory bodies need to be given more independence, a first step of which would be to staff them with attractively remunerated professionals rather than bureaucrats of proven loyalty.

And one should not forget that for most countries, the most significant business relationships are with neighbours. Given its size and strength, India can afford the extra step to quell regional tensions. The government's immediate offer of help to neighbours and its coordination of relief efforts in the region in the aftermath of the Indian Ocean disaster are a silver lining in a heart-rending tragedy. Such an attitude will be helpful, not just in drawing in neighbors, but also the larger world community.

Let me conclude then. Nani Palkhivala once said: "The most persistent tendency in India has been too much government and too little administration, too many laws and too little justice, too many public servants and too little public service, too many controls and too little welfare." Those words ring as true today as when they were uttered.

But India is changing. At the same time, the vote of confidence foreign investors are giving India should not induce any complacency – they are betting on potential, not reality. It is up to India to turn that potential into reality, and it can do it. After all, one only has to look at the success of our software industry, or the success of non-resident Indians like Amartya Sen or Lakshmi Mittal and many of your sons and daughters, to know that given the right environment, Indians are second to none.

One could well imagine India could become a global financial centre – it is in the perfect time zone and has the necessary IT communication, and financial skills. All that is missing is a sounder regulatory environment and the necessary conditions for introducing capital account convertibility.

It could become a centre for higher education – it has the core human capital both in India and dispersed around the world as well as a history of tolerance for ideas. All we need is a more welcoming environment for foreign educational institutions, faculty and students, as well as a greater tolerance for market clearing fees and salaries.

Tourism, healthcare... I could go on but the point should be clear. India's future in a globalized economy lies in its policies, and given it is a vibrant democracy, those are in the people's hands. There is reason to believe that the people's attitudes are changing so that a future Nani Palkhivala will hopefully say, "We are not rich by nature, we are rich by policy." That indeed is my fondest hope.

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# First World People and Third World Politics

Jayaprakash Narayan

August 20, 2005

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Nani Palkhivala was the foremost among our liberal intellectuals who fought against the all-pervasive, inefficient state and the politics of plunder. He combined in himself great erudition with legal knowledge, economic sense, wide experience, superb analytical skills, sharp intellect, fierce adherence to liberal democratic values and an unusual capacity to distil and communicate the lessons of history. He believed passionately that market and morality can, and should, coexist. The underperformance of the extraordinary Indian state, and the fetters imposed on the productive potential of a whole nation, were sources of deep disquiet in him. His post-budget lectures in the eighties were the stuff of legends, with hundreds of thousands keenly following every word, and analyzing each thought. Only Gopal Krishna Gokhale in the early years of the freedom struggle had a similar impact on the nation through his budget analysis.

I was a village lad when Palkhivala became famous. Like millions of my generation, I too believed in the state's will and ability to eradicate poverty and promote human good. The Emergency of 1975-77

shattered many of my illusions. Even then, the hold of socialist rhetoric on me was considerable. Like many, I joined the government believing that the public sector was, by definition, moral and good, and the private sector was somehow suspect. Then, early in my career, I was Special Officer of the Visakhapatnam Steel Project. That stint taught me an unforgettable lesson – that the public sector in India is often the ‘private’ sector of those in public office. Pelf, privilege, patronage, petty tyranny and nuisance value are often the manifestations of power over the public purse in a prismatic society like ours. Since those days of early eighties, I have been an implacable champion of individual initiative, economic liberty and clearly defined, but vital role of the state.

The crisis of 1991 forced our policymakers to embark on a path of economic liberalization. This reform was ushered in more by compulsion than by conviction. Even such half-hearted, halting and incomplete reform yielded good dividends. Gone are the days of waiting endlessly for a telephone connection, or paying a premium to buy a car, or begging for a permit to buy a few bags of cement to undertake repairs of the house. The entrepreneurial energy of Indians was unleashed, and economic growth went up. Wherever choice, competition, technology and transparency were introduced, corruption went down dramatically. Telephones and railway reservation are two outstanding examples of this.

Delicensing and opening up of the economy are critical for growth and prosperity. A part of Palkhivala’s dream was fulfilled by the dismantling of the Licence-Permit-Quota Raj. But increasingly, two dangers are apparent. First, while corruption came down significantly in areas where there is no state monopoly, there is a corresponding rise of corruption in the core areas of state functioning. The Telgi Stamp scam, the murder of Satyendra Dubey, the escapades and misdeeds of Ranjeet Don, who leaked every conceivable question paper, the warrants of arrest issued by an Ahmedabad magistrate against President Kalam and the then Chief Justice of India, V.N. Khare, the CGHS

scam in several cities plundering the public exchequer – all these constitute compelling empirical evidence that corruption is shifting from the traditional licence-permit areas to the core areas of state functioning. As the demand for illegitimate funds is inexhaustible and continues unchecked, closing down some avenues of supply have only led to opening up of other, even more dangerous avenues.

Second, our polity and governance have a profound impact on the economy. While a growth rate of six to seven per cent per annum is still creditable, our performance is far below our potential. The failure of the state and the dysfunctional political process are extracting a heavy toll on the economy and undermining the future and prosperity of hundreds of millions of hapless people. Even the most die-hard market enthusiast cannot deny the vital role of the state. The state, by failing in the crucial areas within its domain, has become a stumbling block for the fulfillment of our potential as a nation. My theme for today's discussion is, therefore, the disjunction between an economy and a society that have shown great dynamism and vibrancy, and the tardy performance and failure of the state which is retarding our future.

The Prime Minister's state visit to the US and its outcome are perceived by different people in different ways. But differing perspectives apart, all have agreed that this visit marked a breakthrough in Indo-US relations, and in the eyes of the western world India is now officially the strategic counterweight to the rapidly rising power of China. India clearly has arrived on the global scene.

The rising importance of India is entirely due to the first world attitudes of our people. Despite mass poverty, limited natural resources, centuries of oppression, a society "fragmented by narrow domestic walls", and historical baggage, the Indian people have extremely positive attributes. It is because of this that there is a feel good factor about the Indian economy. For instance, the Goldman Sachs report titled 'Dreaming with BRICs: The Path to 2050' said: "India has the potential to show the fastest growth over the next 30 to

50 years. Growth could be higher than 5% over the next 30 years and close to 5% as late as 2050 if development proceeds successfully... While growth in the G6, Brazil, Russia and China is expected to slow significantly over the next 50 years, India's growth rate remains above 5% per cent throughout the period. India's GDP outstrips that of Japan by 2032... India has the potential to raise its US dollar income per capita in 2050 to 35 times current levels."

The strength of the family as an enduring institution with the attendant sense of responsibility and infinite capacity to face hardship is at the heart of our resilience as a society. Ordinary Indians exhibit uncommon ambition and drive for their economic uplift. Observe the entrepreneurship of the dabbawallahs in Mumbai or the millions of tiny enterprises in the unorganized sector which are sustaining our economy. People are willing to fend for themselves against heavy odds. For a poor country, the amounts paid by the family for the education of children and healthcare are astronomical. The thrift of our people is legendary. The Indian consumer is not easily swayed by consumerism and seeks good value for money. And time and again, Indian society has displayed an enlightened and modern spirit of nationalism with pride but without much animosity or jingoism. All these are recipes for success in the twenty-first century.

And yet our antediluvian politics is retarding our society. Leadership in the modern world provides a great contrast to that in India. In a remarkable speech to the European parliament recently, Tony Blair exhorted politicians to respond to the challenges of today. Emphasizing the need for keeping pace in a changing world, he reminded OECD countries, "The USA is the world's only superpower. But China and India in few decades will be the world's largest economies, each of them with populations three times that of the whole of the EU ... The (European social model) is allowing more science graduates to be produced by India than by Europe. India will expand its biotechnology sector five-fold in the next five years. China has trebled its spending on R&D in the last five..." Outlining the challenges of today, he

called for renewal of the idea of Europe, and said, “Now, almost 50 years on, we have to renew. There is no shame in that. All institutions must do it. And we can. But only if we remarry the European ideals we believe in with the modern world we live in.” That is the stuff of true politics and great leadership rooted in genuine soul-searching, passion and spirit of public service.

### **The Problem with Our Politics**

Does our politics measure up to the challenges of today? Four unhappy characteristics dominate our political landscape. First is the patronizing attitude to people: citizens know nothing and are parasitic; and they need regulation, protection and doles. As a corollary we need centralized administrative apparatus as a large number of citizens are ignorant and incapable of participating in local governance structures. The notion that citizens have no capacity to understand their self-interest and are incapable of taking charge of their own lives at the local level is absurd in a democracy. And yet, we extol the virtues and wisdom of voters when they exercise their franchise in electing State and national governments.

Many of us admire China’s rapid economic growth in recent years. But we often ignore the fact that employment and exports in China are powered by millions of town and village enterprises (TVEs) with the support and active participation of local governments. One of the ironies of contemporary history is that authoritarian and communist China is far more decentralized than liberal, democratic India!

When the British argued that we were not fit for freedom, our leaders pointed out that good government was no substitute for self-government. They had to grudgingly admit that the British did give good government, and yet we fought for our freedom. Today, centralized government has become a repository of corruption, incompetence and misgovernance. What we have in the name of governance is constitutional brigandage and legal plunder and yet we continue with highly centralized administrative apparatus, which does not facilitate peoples’ participation in governance.

## Unceasing Fervour of Failed Ideologies

This patronizing attitude to people also manifests itself as ideological populism. Examine the quality of debate on the BHEL (Bharat Heavy Electricals Limited) disinvestment. Every perceptive citizen knows that the public sector in India is largely the private sector of those in public office. We only need better goods and services at least cost and it does not matter who produces them. We all know that during the past 50 years, in the name of socialism, we undermined true entrepreneurship and became control freaks.

I vividly remember that only 20 years ago we had cement control and dual pricing, and people had to beg bureaucrats controlling steel sales and seeking bribes and exercising patronage. On the other hand, the state's failure in education, healthcare, rural technologies and infrastructure has been too well documented to need elaboration. In short, the state failed in its core areas of legitimate functioning, and did everything possible to undermine our self-esteem and enterprise. Yet, even today we hear arguments for increased state intervention in non-critical areas.

Let us compare and contrast the efficiency and competitiveness of public sector vis-à-vis private sector. The disinvestment ministry has quoted a study by NCAER (National Council for Applied Economic Research) to conclusively establish that public monopolies cannot effectively respond to changed conditions. Comparisons of factor productivities, profitability and cost structure all show the dynamism of private management and inertia of state control. As the total factor productivity in the private sector recorded 3.4 per cent growth since 1985, in the public sector there was a negative growth of 1.1 per cent. Manufacturing PSEs continue to show losses, while the manufacturing private sector shows decent profits.

From the resource utilization point of view and competitiveness, the most critical comparison relates to cost structure of power and fuel, wages and interest as a ratio of net sales. In 1990-91, the public sector (minus oil sector) spent 37.7 per cent of net sales on these heads as

opposed to the private sector's cost of 21.7 per cent, with a net saving of 16 per cent. Amazingly, by 1997-98, this difference in cost incurred increased to 38.3 per cent of net sales, with the public sector spending 54.5 per cent of net sales on these three items, and the private sector 16.2 per cent! Increased competition and open markets forced the private sector to reduce costs by 5.5 percentage points, whereas public sector costs went up by almost 17 percentage points! There cannot be a more severe indictment of public sector management. The managers are not at fault; the same personnel in the private environment produce excellent results. We must recognize that even if all else is equal, the public sector culture does not foster the best management practices. With the economy opening up and competition growing, continued insistence on government controlling PSEs will only erode their assets and eliminate them from the market.

The champions of state control must answer a fundamental question. Have people elected them to govern or to run a business? Socialism took roots as a moral philosophy on the basis of compassion and concern for equity at a time when predatory capitalism of the robber baron variety led to extreme oppression and misery. But today's market economy has adapted the best features of humanism, welfare and sustainability. Resorting to outdated arguments and shibboleths, and criminal waste of scarce public resources at the cost of justice, rule of law, education, healthcare and decent infrastructure is cruel to the poor and disadvantaged. Quality schooling, accessible healthcare, speedy justice and a security net for the indigent are the best anti-poverty programmes. A government which cannot provide these has no moral authority to take upon itself other burdens and discharge them incompetently.

Ministerial office and bureaucratic sinecures have become private fiefdoms and loss of patronage and control unnerves those in authority. But equating the self-interest of those in power with public interest is an insult to the intelligence of the long-suffering people of the country, and a cruel irony in a society impoverished by bad policies and worse

governance. Moreover, unnecessary and inefficient state interventions and imprudent economic policies are pushing our governments into fiscal crisis. And yet, public interest is sacrificed at the altar of failed ideologies. Or take the fears of globalization stoked by unceasing fervour. The mighty United States and Europe are showing signs of anxiety with the increasing competitiveness and growing market share of China and India, and our antiquated politics can only see dangers in every opportunity! Or take the labour markets: world over, rigid markets and overregulation led to largescale unemployment; and yet we want to perpetuate the status quo at the cost of millions of job-seekers. And of course, the politicians' eternal preference of doles and subsidies over empowerment and liberation of productive potential is too well-known to require elaboration.

### **Politics of Plunder and Rent-Seeking**

The second dangerous feature of our politics is its predatory nature. A politics of plunder and rent-seeking have become the norm and public-spirited politicians are increasingly marginalized. Distortion of markets, kleptocracy and shameless display of unearned wealth has created a culture of illegitimate plutocracy. Power and ill-gotten money acquired by abuse of power have become ends in themselves. Politics has in large measure ceased to be a means to public good. Obsession with power at any cost has created a class of criminals and crooks dabbling in politics, and decent citizens are increasingly shunning public life.

For instance, after the elections to Maharashtra assembly, a one-time mafia don, Arun Gawli, and a few others with notorious records of crime, have become law-makers. Arun Gawli did not even need the support of a major party – he was elected as an independent! In India's poorest state of Bihar too, Pappu Yadav, who strikes terror in the hearts of rival gangs and law-abiding citizens, won with a massive majority and is now a Lok Sabha member, a privilege denied to Dr Manmohan Singh in 1999. Pappu Yadav won against the combined opposition of the Samata Party, the BJP, the communists and the Lok Janshakti!

Wringing our hands in despair at this increasing criminalization of politics and politicization of crime will do no good. We need to understand the economic and institutional imperatives that increasingly legitimize crime and violence in society and public life. These criminals have not come out of a vacuum. Our malfunctioning governing institutions created fertile conditions for their rise. Anyone who has an unresolved civil dispute with a business partner or customer understands how tough it is to run a business ethically in India. For instance, if an honest entrepreneur produces high quality products at a competitive price, and if the government is the monopoly buyer of his product, the travails he faces are unbelievable. If he cooperates with the CBI or other anti-corruption agencies to trap the errant officials, then his troubles multiply. The whole organization suddenly gangs up against him and makes his life miserable.

If such are the problems faced by asset-rich, resourceful and well-connected entrepreneurs, the pain and suffering inflicted on lesser mortals in getting civil contracts enforced, or receiving reparation for damages sustained have to be seen to be believed. A house-owner who cannot get her property vacated even for self-occupation and the owner of a small plot of land who cannot evict a land-shark have no realistic legal recourse in our society.

With 25 million cases pending in courts, and with most litigations taking decades for resolution, people have no realistic hope of justice through formal mechanisms. As a result, millions of cases never reach the courts. Like 'missing' girl children on account of female feticide, there are millions of such 'missing' cases in India every year. These missing cases, and not merely pending cases, reflect the appalling failure of due process and rule of law in our country.

Most people prefer to swallow injustice and suffer silently. A few who have the means, or are desperate, seek rough and ready justice through brutal methods. The neighborhood 'Bhai' or the local mafia don is supplying his services to meet this unmet demand. In a civil court, even if you are lucky to get a decree, an execution petition has to

be filed, and another prolonged, excruciating process begins. But the local don will ensure settlement of the dispute for a price within a few days, and his 'verdict' is enforced instantly. No wonder, many people see crime lords not as villains but as saviours! It is no secret that many banks and other financial institutions are now deploying musclemen to recover debts. If formal, organized businesses feel the need to resort to the use of force to run legitimate businesses, it is no surprise that ordinary people treat criminals with deference. In such a twilight zone, the distinction between 'hero' and 'villain' is erased. Brute force becomes the only effective arbiter. We can set things right only when it is possible to do business or protect rights through peaceful and lawful means. The rise of criminals is a consequence, not the cause, of the breakdown of rule of law. This is particularly true of urban India.

A similar process is at work in government too. The spectacle of helpless citizens in Andhra Pradesh, and at times influential persons and officials, queuing up in front of the Maoist communists ('Naxalites') petitioning for redress of their grievances, says it all. There is no greater indictment of the functioning of our governing institutions than the public display of faith in armed revolutionary groups in the midst of the peace negotiations with government. In general, people have lost faith in the system and have come to believe that nothing is accomplished through peaceful efforts or due process.

Is it a surprise then that voters have no qualms in electing notorious gangsters as their representatives? People do know the difference between right and wrong, and good and evil. But they have realized that an honest, peaceful representative cannot really deliver results in this unhappy milieu. That is why a Manmohan Singh, whose assumption of office as Prime Minister was universally hailed, is not elected as a mere MP in a Lok Sabha constituency. And the decent men and women who do get elected are helpless in getting things done.

We have created a system of alibis in which authority is delinked from accountability, and stake-holding is divorced from power-wielding. In

such a situation, honest legislators have very little capacity to influence events for public good. But a mafia don enforces iron discipline and makes the bureaucracy comply. The very criminal reviled by the media and middle-classes is perceived as a saviour by the common man! And once a gangster makes money, he spends lavishly for 'good causes', styles himself as the leader of his caste or religious group and can muster the muscle power required to navigate through the political and bureaucratic minefield. Witness the rise of Arun Gawli!

Once a legislator gets elected by deploying illegitimate and unaccounted money power, he converts politics into business. While constituents are kept relatively happy by 'good' deeds and selective intervention, the legislator's influence is largely deployed for postings of pliable bureaucrats and transfer of inconvenient officials; distorting market forces and undermining fair competition in contracts, tenders and public procurements; and endless interference in crime investigation. This is the 'dangerously stable equilibrium' Dr Robert Wade – [professor of political economy and development at the London School of Economics' Development Studies Institute (DESTIN)] – described in his authoritative studies 25 years ago.

The situation is even more complex in some ways now, but is by no means intractable. However, as the poet W.B. Yeats lamented, "The best lack conviction and the worst are full of passionate intensity." In the process very few new and powerful ideas are vigorously pursued to improve the conditions of the bulk of our people or to accelerate our growth rate.

### **Medieval Politics**

Third, politics continues to be medieval in nature. Much of the debate on education is centered around the rewriting of history or detoxification of textbooks. The 'great' debates are about the location of a temple or a mosque, or past insults and private injuries, or perpetuation of barbaric practices and shunning of modern, humanistic vision. Obscurantism is zealously guarded, and "the clear

stream of reason has lost its way into the dreary desert sand of dead habit”, as poet Rabindranath Tagore wrote.

The medieval character of our polity is also reflected in the way political recruitment is done. In India, traditionally, parties have been seen as pocket boroughs of those at the helm. Often there are entry barriers to members. Those who pose a potential threat to entrenched leadership are denied access to a party or expelled even for the faintest criticism or dissent. The parties that exhibit such authoritarian tendencies in protecting the privilege of those in power and nipping in the bud any potential threat to individual dominance have not shown the slightest sense of shame or remorse in assiduously cultivating and recruiting known criminals, corrupt persons and those with a dubious record. Such shady elements are courted and welcomed, while decent and dignified citizens are shunned and often rejected. There are no published membership rolls and spurious membership has become a common feature. There are no internal democratic norms and procedures in leadership choices at various levels. There are no mechanisms for open debate or dissent and for influencing the views of members.

Finally, the choice of candidates nominated by a party for elective public office is left entirely to the discretion of the party bosses with members having little say. With this the control of party bosses and coteries is complete – they are often unelected and unaccountable and they perpetuate themselves with illegal funding and a culture of nominations to all party posts and elective offices. All this has created political fiefdoms resembling ancient monarchies or medieval zamindaris.

Little dynasties have spawned all over the country and these oligarchies have a vice-like grip over our legislatures. A careful analysis of the nearly 5,000 legislative offices in the States and the Lok Sabha will reveal that probably two-thirds of them are controlled by about 10,000 well-connected political families. No matter which party

wins, power alternates between members of these families. Politics has become big business. Big investments are made in elections, and much bigger profits are reaped once elected to office. A legislator is more a disguised and unaccountable executive than a public representative. This prevalence of medieval culture in political parties is the root cause of the increasing failure of parliamentary democracy.

### **Incompetent Politics: A Case of Education and Healthcare**

Finally, incompetence and laziness have become virtues in our political domain. Even now, our vision of education is merely increasing enrolment of school children and reduction of dropouts. Quality of education, high productivity of citizens, and seizing opportunities that the modern world offers do not even enter our public discourse. Our universities languish despite the undoubted potential of our youngsters and the civilizational strength we enjoy.

Statistically, the education sector in India looks impressive. We have over five million scientists, engineers and technicians in India now. About 3,00,000 of them (six per cent) are engaged in research and development. We can boast of 4,50,000 allopathic physicians, 2,00,000 agricultural graduates and 40,000 veterinarians. The stock of other postgraduate degree holders is about 4.5 million in the liberal arts, and a million each in the sciences and commerce. In addition, we have about 9.5 million graduates in the liberal arts, 4.5 million in the sciences and 5 million in commerce. Our engineers alone exceed a million now, with 1,100 colleges producing 3,50,000 technologists every year, 60 per cent of whom graduate from the four southern States alone.

All these are impressive numbers by any standards; India certainly has a vast higher education infrastructure, which can be the envy of any developing country. But these numbers hide a grave crisis in our higher education. Our finest scholars – about five per cent – are a match for the brightest and best in the world. But many of them are migrating to the US and the West.

Recent reports say that the 75,000 Indian students constitute the largest foreign contingent in American universities. These are products of the few good institutions, backed by exceptional talent, family support and conducive environment. But most of our colleges and universities produce graduates of indifferent quality. A culture of rote-learning, lack of application of knowledge and poor examination system has undermined our higher education. Most graduates lack basic communication skills, nor do they exhibit the capacity for problem-solving. Educated unemployment is very much on the rise, largely because most graduates cannot promote wealth creation and are, therefore, unemployable. Our society faces an acute shortage of problem-solvers and capable workers in various fields like healthcare, education, justice delivery, and law and order. This is a classic case of a mismatch between our needs and human resources. As the poet S.T. Coleridge lamented, “Water, water everywhere, but not a drop to drink.”

Clearly, the main function of the higher education system is to add real value to human resources and produce wealth creators and leaders in all fields – business, professions, politics, administration and creative pursuits. Even the crisis in school education is compounded by the failure of higher education. Most problems in our schools – curriculum, textbooks, teaching methods, examination system – can be overcome by innovative efforts and sensible public policy. But there is a phenomenal shortage of good teachers. And only university graduates can be teachers! Millions of graduates are hunting for jobs and yet, most of them cannot be trusted with our children’s education. A classic vicious cycle has set in: poor school education has weakened university standards, and the collapse of higher education denies good teachers to schools. All of us face this dilemma in our schools.

Given this, most households are petrified at the thought of a kid to be admitted to school, or a sick person seeking medical attention. Quality education and healthcare are simply inaccessible and

unaffordable to most Indians. Let's take healthcare. There is ample evidence to demonstrate that delivery of public health services in India is insufficient and iniquitous. India's allocation for public health is indeed pitiful – 0.9 per cent of GDP. Shamefully, our public health expenditure at 17 per cent of total health expenditure is comparable to that of failed societies like Cambodia, Burma, Afghanistan and Georgia. Many studies reveal that on an average, an individual spends 60 per cent of the annual income on medical costs for a single episode of hospitalization – whether in a private facility or in a government hospital. Consequently, 40 per cent of hospitalized Indians are forced to sell their properties or borrow at high interest rates. This results in a good 25 per cent falling below the poverty line. Most of this burden is borne by the poor, unorganized sections of the population.

China may run medical schools to educate Indians at moderate costs; the US and Europe may attract bright Indian youngsters to their universities; India may have the potential to create world class facilities to meet our growing needs and become the hub of global education and health services. But our politicians are oblivious to the challenges of today and frame lazy policies and execute them incompetently. But some 'experts' may point out that policymaking in the context of lack of adequate resources is the main culprit. Is this so? Do we have scarce resources?

### **Resources and Development**

The GDP share of public expenditure in India is low compared to OECD countries. But it would be wrong to conclude that the state's incapacity to deliver is a result of shortage of resources alone. The Indian state was never short of resources to abstain from carrying out vital functions necessary for development. Excluding the local governments' expenditure and inter-governmental adjustments, the combined total expenditure of the Union and State Governments, according to the budget estimates, is a whopping ₹ 2,000 crore per day, or in terms of purchasing power, it is equivalent to \$2 billion a day!

Country	PE on Education as % of GDP	PE on Health as % of GDP
United Kingdom	4.5	5.9
Germany	4.6	8.0
United States	4.8	5.8
OECD	5.2	8.1
India	3.2	0.9

What do we get in return and what do we have to show? Eighty million children with no access to proper toilets, shortage of teachers and excess of peons and clerks, appalling public services and woefully inadequate infrastructure. Without having to increase public expenditure, without having to seek aid from international agencies, these 80 million children could all have access to basic school education. It just requires some reallocation of funds and commitment from the governing class. At 50 children per classroom, we need to build 1.6 million classrooms. Each classroom can be built at ₹ 1 lakh or less. This will incur a one-time expenditure/investment of ₹ 16,000 crore. This is equivalent to only 10 days' government expenditure! Running the school – teachers and basic teaching aids – would incur a recurring expense of ₹ 8,000 crore, a mere five days, expenditure! A very paltry investment when you calculate the social and economic returns to the country.

Similarly, all it takes to provide a safe, hygienic toilet for every household is about ₹ 12,000 crore public expenditure (half the needy households can pay from their own resources, if technology and material are accessible, and a campaign is launched to promote proper hygiene and sanitation). This is equivalent to a one-time investment equal to six days' public expenditure. Studies have also shown that our public health system can be completely revamped, and healthcare improved and made accessible to the poor and needy at an additional cost of about ₹ 10,000 crore per annum.

These examples demonstrate that while resources are scarce, even the available resources are not properly deployed. The Indian state has increasingly become a stumbling block to our economic growth prospects. It guzzles vast resources and produces very little in return. We have, in all, about 28 million workers in the organized sector, or about eight per cent of the total workforce in the country. Of them, an astonishing 20 million, or nearly three-quarters, are in government! About 13 million are directly employed by the government at various levels, and about seven million are in public sector undertakings.

This number in the last decade has actually increased by nearly a million. The problem is not the size of government employment in absolute terms. Many nations have a larger proportion of population employed by the government. Therefore, the solution does not lie in mindless downsizing. What we need is redeployment and greater productivity.

Take a large state like Andhra Pradesh with 9,00,000 employees in government. About 1,80,000 or 20 per cent are unproductive as they are engaged as peons and drivers. Another 30 per cent (2,70,000) are support staff (clerks, etc.) whose only purpose is to allegedly help the decision-makers. There are about 40,000 officials with decision-making power at some level or other and they could perform far more efficiently and economically with a well-trained support staff of a total of 60,000. But we have 4,50,000 of them employed as clerks, drivers and peons. We have about 3,10,000 teachers, and the State probably needs another 3,00,000 teachers of good quality to sustain a credible school education infrastructure. The healthcare system is inadequately staffed. We have just over 1,000 judges in the State and a total of about 12,000 in India. Germany, with a population of 80 million, has 30,000 judges. We have far fewer police personnel than needed in modern times. All this demonstrates that it is not merely the size of the government that matters, but the productivity of the government. Clearly, we have to enhance productivity and efficiency in the government, especially in the health and education sectors, for faster and equitable growth.

## **Win-Win Solutions – A Recipe for Growth**

Increasing productivity and efficiency in four areas, including health and education, will raise growth rates spectacularly. All these are politically feasible, win-win solutions, which can be implemented within the present or projected budgetary allocations.

First, delivery of education at both school and university level. Allocations for schools have gone up and the recent education cess is universally accepted. But even in this day and age, our focus is merely on enrolment and retention, and not on quality. As a result, much of our education is failure. Functional literacy, communication skills, conceptual clarity, skill promotion, and creation of meaningful knowledge and its application form the essence of education.

Except for a few elite schools and colleges, and a small proportion of gifted children, most of our education is unproductive. As a result, millions of unemployable school and college graduates are churned out every year. Happily, there is phenomenal demand for quality education. Even the poor are willing to spend considerable sums for education, in the hope of a better future for their children. Sensible policies and non-monetary inputs based on best practices will improve the quality of human power and enhance growth rate by at least one per cent.

Second, our healthcare system is in a shambles. The government's record in public health is appalling. A few correctives have been applied in recent years, and the Prime Minister launched the Health Mission in April 2005. But more allocations and better infrastructure alone are not sufficient. Avoidable hospital costs and sickness are the chief causes of poverty, indebtedness and low productivity. Decentralized management, accountability to the community, integration of various health programmes, and nutrition, water supply and sanitation at the grassroots level and most of all, choice, competition and altered incentives in hospital management are the critical changes in trajectory in healthcare delivery. If there is a genuine change of course, even the projected modest enhancements in allocations for public health will

ease the suffering of the bulk of our people, raise their productivity and incomes, and substantially accelerate growth.

Third, rule of law is the bedrock of market economy and growth. Proper land surveys, assured property titles, speedy and fair adjudication of disputes, swift punishments for violation of law, quick and effective enforcement of contracts and non-discriminatory treatment are all critical requirements to ensure predictability and encourage investment, risk-taking and hard work. While normatively we have an independent judiciary and institutions of rule of law, in reality they are moribund and ineffective. As a result, there is a growing market demand for criminals in society, and mafia and musclemen have become the undeclared judges dispensing rough and ready justice by brutal means for a price. There are reports of even a few foreign banks in India hiring musclemen to enforce recovery of over dues. Clearly, such a climate inhibits economic activity and retards growth. There are many low cost, politically acceptable, popular mechanisms to improve justice delivery and rule of law. This alone will enhance growth by at least one per cent per annum.

Fourth, extraordinary corruption and arbitrariness in tax departments are sapping the energies of small and medium enterprises and seriously eroding the competitiveness of our manufacturing sector. Direct taxes have witnessed some measurable improvements. But the administration of central excise, service tax, customs and State-level sales tax is still largely discretionary, unpredictable and arbitrary. Rent-seeking behaviour is, therefore, exceedingly common, seriously undermining the competitiveness of honest taxpayers, and diverting the precious time and energy of the entrepreneurs. Transparent, industry-friendly procedures will not only help the economy, but will also enhance revenues. It costs no money, and yet boosts growth.

Improvements in these four sectors cost little, make the government popular, accelerate economic growth by 3-4 per cent, promote investment and employment generation, and create several virtuous cycles of growth, savings and investment. All these are eminently

feasible but require bureaucratic accountability and delivery of services, sound, self-correcting, sustainable policies, and display of minimum level of political skills to build consensus and mobilize public opinion in favour of these improvements. These are the elements that constitute good governance and that is what is lacking now. However, given the complex nature of our crisis, many of the reforms suggested are necessary but not sufficient. What is the nature of the political crisis we are talking about?

### **Interlocking Vicious Cycles**

In a well-functioning democracy, the political process ought to find answers to governance problems. Every election holds a promise for peaceful change. People in India have been voting for change time and again. But the political processes are locked in a vicious cycle and have become a part of the problem. There are several factors complicating the political process, perpetuating the status quo.

First, election expenditures are large, unaccounted and mostly illegitimate. For instance, expenditure limit for assembly elections in most major States was ₹ 6 lakh until recently when it was revised to ₹ 10 lakh. In reality, average expenditure in most States is several multiples of it, sometimes exceeding ₹ 1 crore. Most of the expenditure is incurred to buy votes, bribe officials and hire musclemen. Sadly, the southern States which are hailed for better governance, have the dubious distinction of being the worst offenders in this regard. The expenditure incurred in Andhra Pradesh in the current assembly and Lok Sabha poll is estimated to be above ₹ 800-1,000 crore. On an average, the leading candidates for the assembly spend ₹ 1 to 1.5 crore each, and those for the Lok Sabha about ₹ 3-4 crore each. The expenditure in the Kanakapura (Karnataka) by-election for the Lok Sabha held in 2003 was estimated by knowledgeable people at about ₹ 20 crore. The eventual winner was reported to have been heavily outspent by his nearest rival. Curiously, the stakes in that by-election were limited: only some months of Lok Sabha membership were at stake, and both the leading contenders would have been in the

Opposition! The Saidapet by-election in the Tamil Nadu assembly too was said to have broken records, with expenses exceeding ₹ 10 crore.

There are three features of such skyrocketing election expenses. First, large expenditure does not guarantee victory; but inability to incur huge expenses almost certainly guarantees defeat. There are a few candidates who win without large expenditure, but such constituencies are limited. Also in great waves, expenditure is irrelevant. The Lok Sabha victory of the Congress in 1971, the Janata in 1977, N. T. Rama Rao's victory in Andhra Pradesh in 1983 – these are among the many examples when money power had no role. But in the absence of ideology, and increasing cynicism, large expenditure has become necessary to win. Desperate to win at any cost, parties are compelled to nominate mostly those candidates who can spend big money. Such large, unaccounted expenditure can be sustained only if the system is abused to enable multiple returns on investment. The economic decision-making power of the state is on the wane as part of the reform process. But as the demand for illegitimate political funds is not reduced, corruption is shifting to the core areas of state functioning, like crime investigation. Robert Wade studied this phenomenon of corruption and described the dangerously stable equilibrium that operates in Indian governance. This vicious chain of corruption has created a class of political and bureaucratic 'entrepreneurs' who treat public office as big business.

Second, as the vicious cycle of money power, polling irregularities and corruption took hold of the system, electoral verdicts ceased to make a difference to people. Repeated disappointments made people come to the conclusion that no matter who wins the election, they always end up losing. As incentive for discerning behaviour in voting disappeared, people started maximizing their short-term returns. As a result, money and liquor are accepted habitually by many voters. This pattern of behaviour only converted politics and elections into big business. As illegitimate electoral expenditure skyrockets, the vicious cycle of corruption is further strengthened. With the public

delinked from voting, honesty and survival in public office are further separated.

Third, this situation bred a class of political ‘entrepreneurs’ who established fiefdoms. In most constituencies, money power, caste clout, bureaucratic links and political contacts came together perpetuating politics of fiefdoms. Entry into electoral politics is restricted in real terms, as people who cannot muster these forces have little chance of getting elected. While there is competition for political power, it is often restricted between two or three families over a long period of time; parties are compelled to choose one of these individuals or families to enhance their chances of electoral success. Parties thus are helpless and political process is stymied. The absence of internal democratic norms in parties and the consequent oligarchic control has denied the possibility of a rejuvenation of the political process through establishment of a virtuous cycle.

Fourth, in a centralized governance system, even if the vote is wisely used by people, the public good cannot be promoted. As the citizen is distanced from the decision-making process, the administrative machinery has no capacity to deliver public services of high quality or low cost. Such a climate which cannot ensure better services or good governance breeds competitive populism to gain electoral advantage. Such populist politics have led to serious fiscal imbalances.

Fifth, fiscal health can be restored only by higher taxes or reduced subsidies or wages. The total tax revenues of the Union and States are of the order of only 15 per cent of GDP. Higher taxation is resisted in the face of ubiquitous corruption and poor quality services. De-subsidization is always painful for the poor who do not see alternative benefits accruing from the money saved by withdrawal of subsidies. A vast bureaucracy under centralized control can neither be held to account, nor is wage reduction a realistic option.

Sixth, elected governments are helpless to change this perilous situation. As the survival of the government depends on the support of legislators, their demands have to be met. The legislator has thus

become the disguised, unaccountable executive controlling all facets of government functioning. The local legislator and the bureaucrats have a vested interest in denying local governments any say in real decision-making. The vicious cycle of corruption and centralized, unaccountable governance is thus perpetuated.

Seventh, the first-past-the-post (FPTP) system exacerbates our social divisions as it tends to over-represent geographically concentrated social groups and under-represent the scattered minorities. The representational distortion leads to ghettoization and marginalization of the excluded social groups, which then indulge in strategic voting. This gives rise to vote-bank politics in which obscurantists become interlocutors of the group drowning the voice of reason and modernity. For instance, religious symbolism and not education and job opportunities become dominant issues of public discourse. This pandering to fundamentalism leads to competitive mobilization of various groups based on primordial loyalties, leading to communal polarization and social strife.

Eighth, the need for money power and caste clout to win a plurality of votes in the FPTP system precludes the political participation of men and women of integrity and competence. With their exclusion, bad public policy and incompetent governance become endemic, deepening the crisis.

Ninth, under the FPTP system, only a high threshold of voting ensures victory. Usually a party needs 35 per cent vote or more to get reasonable representation in legislature, or social groups with local dominance get elected. As a significant but scattered support pays no electoral dividends, reform groups and parties below the threshold tend to wither away. Voters prefer other 'winnable' parties and candidates. This tends to marginalize reform parties and national parties in many States. It is no accident that the main national parties, the Congress and BJP, are directly competing for power in only a few major States. In most States one or two regional parties are dominant. FPTP thus tends to lead to oligopoly of parties.

Given this complex nature of our crisis, many of the reforms that have been enacted and those in the pipeline are necessary, but not sufficient. Apart from reforms in local governments, judiciary and bureaucracy, and effective instruments to enforce accountability and check corruption, we need to pursue systemic reforms changing the nature of elections and process of power. In my considered judgment, there are three such reforms required.

## **Political Reforms**

### ***(1) Proportional Representation***

The FPTP system that India has adopted led to several distortions, given the passage of time and ingenuity of legislators. The politics of fiefdom at the constituency level has forced parties to rely on local strongmen. As a result, the political parties and independent candidates have astronomical election expenditure for vote buying and other illegitimate purposes. This has led to a significant weakening of the party platform and ideology, reducing elections to private power games. In many States, national parties have been marginalized where their voting percentage falls below a threshold. Following from this, regional parties have occupied centre-stage in several pockets, holding larger interests at ransom.

All these failings find expression in serious and long-term predicaments. The inability of all political parties to attract and nurture best talent is the primary issue. Difficulties of minority representation leading to a ghetto mentality, backlash and communal tension form another facet of the problem. Lastly, leadership is undermined by the permanent reservation of constituencies (or regular rotation) in order to provide fair representation to excluded groups. The solution to this flawed system is adoption of a mixed system of election combining the FPTP system with proportional representation. This can be broadly based on the German model. The key features of the suggested system are as follows:

- The overall representation of parties in the legislature will be based on the proportion of valid votes obtained by them.
- A party will be entitled to such a quota based on vote share only when it crosses a threshold, say 10 per cent vote in a major State and more in minor States.
- 50 per cent of legislators will be elected from territorial constituencies based on the FPTP system. This will ensure the link between the legislator and the constituents.
- The balance 50 per cent will be allotted to parties to make up for their shortfall based on proportion of votes.
- Example 1: If the party is entitled to 50 seats in the legislature based on vote share, but had 30 members elected in the FPTP system, 20 more will be elected based on the party list.
- Example 2: If the party is entitled to 50 seats based on vote share, but had only 10 members elected in the FPTP system, it will have 40 members elected from the list.
- The party lists will be selected democratically at the State or multi-party constituency level, by the members of the party or their elected delegates through secret ballot.
- There will be two votes cast by voters – one for a candidate for the FPTP election, and the other for a party to determine the vote share of the parties.

It needs to be remembered that the proportional representation (PR) system can be effective only after the internal functioning of political parties is regulated by law. Otherwise, it will give extraordinary power to party leaders and may prove counterproductive. However, it has one more advantage of ensuring better representation of woman in legislatures.

### ***(2) Political Party Regulation by Law***

Political recruitment has suffered a great deal and bright young people are no longer attracted to politics. The centralized functioning of

parties is imposing an enormous burden on leadership to manage the party bureaucracy, leaving little time for evolving sensible policies or governance. Party leaders are helpless in candidate selection, and the choice is often between Tweedledum and Tweedledee. An important reform to improve the quality of politics and restore credibility would be a law to regulate political parties functioning, without in any way restricting leadership choice and policy options. A law needs to be enacted to regulate political parties in the following four key aspects:

- Free and open membership with no arbitrary expulsions
- Democratic, regular, free, secret ballot for leadership election; and opportunity to challenge and unseat leadership through formal procedures with no risk of being penalized
- Democratic choice of party candidates for elective office by members or their elected delegates through secret ballot
- Full transparency in funding and utilization of resources

The provisions can be similar to Article 21 of German basic law and federal law to regulate parties.

### ***(3) Clear Separation of Powers at the State and Local Levels through Direct Election of Head of Government***

The other systemic reform that is needed to isolate the executive from unwanted influences, as has been pointed out, is to ensure direct election of the head of government in States and local governments.

As election costs have skyrocketed, candidates spend money in anticipation of rewards and opportunities for private gain after election. Legislators perceive themselves as disguised executive, and chief ministers are hard pressed to meet their constant demands. Postings, transfers, contracts, tenders, toll gates, parole, developmental schemes and crime investigation – all these become sources of patronage and rent-seeking. No government functioning honestly can survive under such circumstances. While the legislators never allow objective and balanced decision-making by the executive in the actual

functioning of legislation, their role has become nominal and largely inconsequential. This blurring of the lines of demarcation between the executive and the legislature is one of the cardinal features of the crisis in our governance system.

Therefore, separation of powers and direct election are necessary in States and local governments. At the national level, such a direct election is fraught with serious dangers. Our linguistic diversity demands a parliamentary executive. Any individual seen as the symbol of all authority can easily become despotic, given our political culture. But in a State, separation of powers poses no such dangers. The Union Government, Supreme Court, constitutional functionaries like the Election Commission, UPSC and CAG, and the enormous powers and prestige of the Union will easily control authoritarianism in any State. This necessitates the adoption of a system of direct election of the head of government in States and local governments. The fundamental changes suggested find mention as under:

The legislature will be elected separately and directly while the ministers will be drawn from outside the legislature. The legislature will have a fixed term, and cannot be dissolved prematurely except in exceptional circumstances (sedition, secession, etc.) by the Union government. The head of government will have a fixed term and cannot be voted out of office by the legislature. Any vacancy of office will be filled by a due process of succession. The elected head of government will have no more than two terms of office. Even though these changes may not be the panacea for all evils in the present structure of legislature and executive, they will certainly encourage more healthy and vibrant democracy and democratic processes. Further, clear and periodic delineation of functions between Union and States, and among various tiers of local governments, are also a necessary condition for a vibrant democracy.

Given a mismatch between the aspirations and ability of our people and our political process, ushering in systemic political reforms is an immediate task. Clearly, such a mismatch between first world people

forging ahead with growing aspirations and third world politics undermining our prosperity and happiness is unsustainable. Either the people will have to force politicians to change and recreate a polity worthy of us and capable of meeting the challenges, or politics will retard our future and bring India down by several notches. Which will happen first? This is the great question of this decade, and the future of our nation and the world will be shaped by the answer we give together.

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# **Fiscal Prudence v. Public Expenditure**

**S. Narayan**

January 16, 2006

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I am going to talk on a subject that transcends budgetary numbers, which will affect not only the polity of this country, but also its political economy. The first point that all of us must realize is that we in India have a story and that story starts like this. If you look at the period 1973-1982, the aggregate GDP growth was 3.5 per cent and per capita growth 1.2 per cent; it had taken 57 years to double the GDP. Between 1982 and 1992, the aggregate GDP grew to 5.2 per cent and per capita growth was 3 per cent. The time it took to double the GDP was 23 years. Between 1992 and 2002 we were aggregating 6 per cent GDP growth. The per capita growth went to 3.9 per cent with the GDP doubling in 18 years. If extrapolated forward to 2002-2012, you get an aggregate GDP growth of approximately something between 6.7 and 6.9 per cent. You will get a per capita growth that's a sharp increase of 4.6-4.7 per cent with GDP doubling in 11-12 years. This means the economy is practically doubling itself every decade.

We must appreciate that between 1972 and 1982, the population growth was in excess of two per cent, whereas in 2002-2012 it is

estimated to be less than two per cent. This is even more impressive because per capita growth has been increasing in spite of the fact that the population in 1972 was less than half of what the population is expected to be in 2012. This is quite a phenomenon. Besides, this is across governments, across politics, across different sets of [events such as] oil shocks, natural calamities, external shocks and financial shocks. So I think as a country we have a story, and that story is that if you're able to double the GDP every 11 to 12 years, you are going to be in the league of very few nations, just about five or six nations in the world, that are going to be of this size. Already the size of this economy is very close to over three-fourth of a trillion dollars, the fourth largest in the world. So, we should be catching up with Japan and just have the US and China, in terms of size [to catch up with]. The per capita income is still extremely low, but the moment the per capita income crosses a thousand dollars the total picture changes, the total picture of consumption or demand or expectation of services or the very nature of the people who live here will actually change and the dramatic change is in my opinion only few years away. We will probably see this before the year 2010. You can see signs of this happening already in the last couple of years.

Of course, there are some variations to the story. Let us look at the per capita income in 14 major States of this country for 2003-2004 and you will see that the per capita income variation goes from a high of ₹ 19,673 in Gujarat down to ₹ 4,088 in Bihar. The States of Gujarat, Maharashtra, Haryana, Punjab, Tamil Nadu, Karnataka and Kerala are by and large performers. If you look at their health, social, educational or industrial parameters, they form the same pattern. But the huge variation in per capita incomes is a worry.

This is not the only worry; the next thing to observe is the way in which per capita incomes in the States with the highest figures and the lowest have changed the over the years. In 1970-71 the difference in the per capita income between the best and the worse States was only 2.1 times. Today we have difference of over 4.5 times. After the

so-called economic reforms of 1990-91, the difference in per capita incomes between States has increased very substantially. The increase that occurred between 2000-2001 and 2003-2004 is as much as the increase in a decade between 1980-81 and 1990-91. This means that the poorer States are definitely getting much worse of and they are getting much worse of much more rapidly. If you want to look at the positive side, the better States are getting better off much more quickly; but this is a concern. If you extrapolate it forward you don't get a good picture. The income of the richer people and the poorer people inside each State gives you a grim picture.

Even in States that are relatively well off in per capita income, you see inter se inequality. Coefficient measurement of anything above .18 or .2 gini coefficient you can generally say is substantially poor. You can see this even in States like Maharashtra and Kerala where gini coefficient figures cross .3 indicating that within the State the difference between rich and poor is in fact quite high. It is very interesting that all over the world, including in the US and China and developed economies such as Singapore, you see the difference. The income disparities are increasing, that is, poorer people at the lower end are worse off than they were about seven or eight years ago compared to rich people in terms of proportion of income the rich have versus the poor. It's by and large a general standard, but for us it's a matter of significant concern because if we have a co-efficient of .37 in Bihar and the per capita income of about 4,000 rupees as the average income, even if this is a very rough measure, about one-third of the population of Bihar gets just about ₹ 1,000 or ₹ 1,500 a year, which is about a 100 rupees a month, it is a terrible figure. These kinds of numbers are causing quite a bit of concern and this concern is translating itself into the economic and political management of the economy.

I would just give two more numbers before I move on. So far, we have talked about financial GDP figures and income figures. But if you look at it a little differently at the social development parameters,

(it is) a slightly different picture and even that picture is just an indicator with two numbers. If you look at female literacy rates, I will definitely say that this is something all of us know. But to put that in perspective, Kerala has by far the highest figures. But again, it is interesting to see that those States with higher per capita incomes, which have good performances, are reasonably okay in female literacy. You see Gujarat, Maharashtra, Haryana, Punjab, Tamil Nadu, Kerala, Karnataka and West Bengal doing reasonably well, though Kerala is very much ahead. And you see the poor performance of UP, Bihar, Orissa, Madhya Pradesh and Rajasthan. One more indicator is health and you can see that if you look at hospital beds per capita, you see the increased number available in Kerala and surprisingly you have a low figure for Haryana. That is a very simple aberration because of the proximity to the medical facilities in National Capital Region. So please forget the statistics for Haryana. But if you look at the pattern, you still see that better States are reasonably all right and Kerala is excellent. And the rural [predominantly agricultural] States are worse off.

We have a picture that India is doing very well, but not all of India is doing well. Parts of India are doing very well and some parts are not doing very well. And even in those parts that are doing very well, it's not as if all the people are doing very well. This means the States must take note of the situation and do something about it. I think by and large all political commentators ascribe the election results of 2004 to the fact that growth did not penetrate down to the villages. By and large, the middle class was growing, but the non-middle class was not. They were getting more disenchanted and that's one of the reasons for the election results in 2004. Recently, Mr Chandrababu Naidu in a public appearance in Singapore said openly that although they had initiated a lot of development, they lost the elections. So, we have a situation in which economic development did not lead to the anticipated electoral results for the people claiming they enabled economic development. The argument was that they did not enable economic development for the poor and a government that cannot give economic development for the poor is no government at all.

From the data available in the 12<sup>th</sup> Finance Commission report you can see that most of the States have a very poor record when it comes to access to basic amenities, such drinking water, sanitation, etc. Why did this happen? Why has there been so much change in income inequality within States and between States? One argument links this to the fiscal compression that took place after 1991-92 when the reform process started. This can be seen in the budgets of 91-92, 92-93, and 93-94. Fiscal compression had occurred partly because our balance of payments was poor, partly because of the IMF loan and other outstanding loans, and partly because at that particular time, market forces were considered to be more supreme than interventionist forces.

The mantra at the time was that the market would take care of everything. Consequently, there was a sharp compression in expenditure on agriculture, irrigation, health and education. You see the compression clearly if you compare the 1991-94 figures with those for 1989-90. The compression in plan expenditure was on what is called basic and social needs. The result was that State governments that largely depend on hand-outs of State and centrally sponsored programmes, had to go back to their own resources to keep the programmes going. States that were fiscally comfortable and comparatively better developed were able to sustain these programmes to some extent. Other States that did not have the wherewithal nor the financial room to manage these programmes, allowed them to collapse. Some States went to the extent of borrowing heavily to manage these programmes. The most typical example is the Maharashtra government of the time which took on huge irrigation projects (15-year projects) based on five-year term loans. Naturally it got deeper and deeper in debt.

So, if you see the development of the fiscal crisis in the States, you can see a distinct disjoint, what in mathematics we call singularity. A distinct singularity occurred in 1991 and this singularity can be traced to the fact that there has been less flow of central plan systems to the States. In a way, the reform process totally forgot about the public.

I think we can trace the beginnings of the increase in inequality to the kind of decisions that were taken. It is, therefore, extremely important to understand that when the same set of thinkers and policymakers came back to positions of responsibility in 2004, they immediately realized that this was an issue that needed to be corrected. They had to revisit areas where growth in expenditure was comparatively less. Public sector expenditure had to be increased, additional provision for education had to be made, social services had to be provided and that's the kind of policy we've been seeing since 2004. Of course, coalition politics also made this more acceptable; you had other parties also encouraging this to happen. You had a platform which already said that the poor were getting deprived. But the correction of these policies is what happened and that is the reason why you are seeing an increase in public expenditure. Can we capture what was lost? That is the question we have to look at. Has the fiscal situation in the States and the Centre over a period of 10 to 12 years left enough room for us to make up for what we have lost is the question that we have to address now.

Therefore, if we have to take a policy decision to revisit public expenditure for the social sector, enlarge the central plan outlay, and ensure that those areas that were neglected in the last 10-12 years are expanded in terms of investment, I think the first thing to look at is what is the state of my total debt. Looking at the picture of the debt to GDP ratios in 2003 of the different States – the thumb rule being that anything above 30 per cent is high and not sustainable – there are many States that are very poorly off. West Bengal was continuously borrowing much more than it should. I will put a question mark against Maharashtra's numbers too, due to reporting issues. You can look at the debt positions of Punjab, Orissa and Bihar. Without going into too much detail I would say that of the total debt, the share of Uttar Pradesh was 11.9 per cent and of West Bengal 10.45 per cent. These States have the highest debt. Maharashtra has 9.5 per cent. Between these three States we have 30-40 per cent of the total debt. So, with such high debt to GDP ratio, these States would definitely be constrained in opportunities for further investment.

As a country, we have a tax to GDP ratio of just about 10 per cent, compared to UK which is about 30 per cent, and Europe which is over 30 per cent. In fact, we've been struggling to cross the magic number of 10 for quite a while but haven't been able to do it. State tax to GDP ratios are extremely poor, a notable example being West Bengal which is a high borrower. This means the tax collection methods are among the poorest in the country. Punjab is a very high debt State with a very poor tax-GDP ratio; Bihar of course has a high debt and a poor tax collection ratio. Any ratio lower than 6 I would call absolutely abysmal. Lower than 10 would be abysmal. You can see the best ratios in Tamil Nadu, Karnataka and Kerala.

These numbers kind of indicate what States can do by themselves, given that their ability to collect taxes is poor, their ability to sustain social programmes is low, and their debt is already high. They have to immediately go to the Centre to bring in the kind of investment and capital required to make sure that areas neglected in the last 10-12 years are given attention. The National Common Minimum Programme emphasizes all those activities that were the responsibility of the States and for which the Central Government is now taking the responsibility by promising to invest and fill the gaps in the States' funding capabilities. These are either direct or indirect, as grants or loans or plan schemes or centrally sponsored schemes. There is a shift away from State-managed development to Centre-managed development. This is the change that has come about in 2004.

Now that the Centre has taken on the States' responsibilities, it has actually taken on much more than its capacity or than what was intended in the Constitution. Prior to a constitutional amendment, primary education was the responsibility of the States. The Sarva Shiksha Abhiyan and the mid-day meal programme are schemes which we, sitting in Tamil Nadu, are aware have been State schemes for many years. It has now been introduced as a Central scheme because of the gap in the primary education performance; literacy in the country as a whole is only 56 per cent for females and 62 per

cent for males. We are looking at numbers that in any case appear to be quite serious. If you look at gross numbers: 10 million children are going to class 8 every year but 10 million children remain totally illiterate every year, after 55 years of Independence. We have to do something about it.

The fiscal position of the Centre has never been good. In 1990-91 they were having serious problems. The fiscal deficit was 6.61 per cent, the revenue deficit – the difference between revenue income and revenue expenditure – was 3.26 per cent. Primary deficit was 2.83 per cent, that is fiscal deficit minus interest payments, but more importantly the ratio of revenue to fiscal deficit was 49.36, but in 2003-2004 the ratio of revenue to fiscal deficit was 75.59, which means that three-quarters of the deficit of the Centre was being used only for revenue expenditure, not for any creation, not for any capital expenditure. In other words, for every rupee that you are borrowing from the market, you can spend only 25 paise on capital.

You have a serious problem but where are you going to find the money for the so-called increases in the kind of expenditure that we have been talking about? Schemes like Bharat Nirman Yojana and others? Money is obviously going to come only from further borrowings. One way of reducing the ratio of revenue to fiscal deficit, to put it in a jocular fashion, if you borrow so much more that the denominator becomes larger you may get huge fiscal deficit, keep the revenue deficit the same, but spend more on capital; and if you look at the budget numbers that is possibly one of the alternatives the government appears to be adopting at the moment. Having enacted the Fiscal Responsibility and Budget Management Act (FRBMA) 2003, the government says it will reduce revenue deficit to zero by 2008, and bring the fiscal deficit to below three per cent by 2008. Last year the Finance Minister said that it is not going to be possible, and we have to postpone this by one year because of commitments in social expenditure. That means in a way he has declared that fiscal prudence is going to be postponed in India because he wants to focus on Plan expenditure. The other very interesting strategy is that plan expenditure in 2003-2004 was

₹ 1,22,000 crore; in 2004-2005 it increased to ₹ 1,37,000 crore and in 2005- 2006 to ₹ 1,43,000 crore. Although the increase is only about ₹ 7,000 to 8,000 crore the Plan schemes announced by the Finance Minister are about ₹ 1,79,000 crore and he has said that the balance will be borrowings by the States.

You have seen that there are States whose debt to GDP ratio has room for a little bit of flexibility. So, a lot of lending power has been transferred to the States. If you take the fiscal deficit of the States and the Centre together the picture has not changed. However, while keeping a substantial portion of the prime expenditure the Finance Minister has passed on a lot of worries to the States by passing on a further debt burden of ₹ 28,000-29,000 crore this year to them. The other development is the announcement of the creation of special purpose vehicles (SPV) for infrastructure. This vehicle will access and borrow funds from the market to finance infrastructure schemes. Similarly, the Bharat Nirman Yojana, which requires about ₹ 100,000 crore, will also be funded by the SPV and off-budget borrowings. In fact, there is desperation regarding finding resources for expenditure since the revenue collections do not meet the expectations. Why the desperation? Why the loss of belief in the market economy? Why do people no longer believe that things will happen if you allow the market to operate?

There are two or three interesting and important signals to watch for. I would like to point out the policy changes that are happening in West Bengal. You had a government that ruled for the last 20 to 25 years. Immediately after coming to power it executed land reforms. It provided land to everybody. It is the most successful land reforms movement in the whole country. Once land was distributed West Bengal gave way to a green revolution and a basic level of livelihood and sustenance were available even for the poor. The government did not impart any further economic measures until a year or two ago when it came forward to say it wants investments, more IT, more knowledge-based industries. It is interesting to see that even in the revised mode of inviting applications for projects, the focus is on

knowledge economy and not on manufacturing or coal mining or iron ore. The focus is not conversion of commodities but on knowledge-based economy development, IT park development. A theory that is put forward by several political economists across the world is that finally economic development in a democracy is all about winning elections.

The concept of the chief minister as the chief executive is just about 15 or 20 years old in India. Prior to 1980, the bureaucracy suggested, recommended and passed strategy. After 1980, you found chief ministers in several States taking charge of the development process as a strategy to win elections. In States where the electorates of the winning parties expect and demand economic development, you have delivery of development. In States where the electorates which are placing these governments in power or electorates which are not economic development-demanding electorates, but electorates that are much more fragmented, etc., the winning of an election no longer requires the development process. If you take Maharashtra, you will see that the development programmes initiated by the NCP government and the Shiv Sena government were totally different.

On the other hand, in Kerala, there is hardly any delivery other than by the NGO sector or independent mechanisms. It is quite possible that political parties may be seriously thinking that appealing for votes to the poorer sections on the point that they have been left out might be an electoral strategy in itself. Then really efforts for development are not necessarily necessary for winning elections. If this hypothesis is true, then I would worry very much because I would see in the future, fragmentation of quality in a manner between those who are trying for economic development efforts and those who are in fact saying “Why should we waste our time? Let us focus on those sections of the electorate which are backing us to power and let us not worry about the economic development process. Let us not worry about the delivery process.”

It is in this context that I am extremely happy that the Central Government – which is an amalgam of different kinds of thoughts, different kinds of policies, different kinds of thinking – is at this moment trying to bring the parts together. “Let us have something called inclusive growth ratio that lets us make sure that the economy will come back to the mainstream.” I think we should give all credit to the government that they are going forward even if they give up fiscal prudence for a particular period of time, even when there is higher fiscal deficit. All of us as economists, as number crunchers, should sit back and say, “Forget fiscal deficit for a while and focus on expenditure.” However, the one final leg of this triangle is governance, the ability to ensure that the money that is provided is actually used for the purpose for which it was intended.

That is why I worry whether providing money to the States, especially those that are relatively poorer, will enable them to make sure that the administrative processes actually deliver. It would be interesting to see the development that happens in Bihar in the next one year. Will the poor get better opportunities and will the the system be able to deliver? We have to watch whether they are able to convert the finances that are available from the Centre into meaningful programmes that will help the poor. If this experiment fails, we will have only ourselves to blame. So, if I look at the political economy of the government for the next two years, I would definitely like to say that we have a great story but we are walking on the edge. Perhaps we will be able to see in 2008 or 2009 on which side we are going to be, and there is no saying that we will be on the right side of the edge at that time.

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*Dr S. Narayan (b. 1943) has nearly four decades of public service, in both the Central and State governments. He was Economic Advisor to the Prime Minister (2003-2004), and Finance and Economic Affairs Secretary. He was also visiting faculty at several academic institutions, including the National Academy, Mussoorie.*

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# **The Challenges Before Indian Policing – the Way Ahead**

**Kiran Bedi**

July 22, 2006

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I was a great admirer of Mr Palkhivala. I remember having attended some of his pre-budget and post-budget speeches and I do remember a very warm hug I received from him one day. It was a fatherly hug given to a daughter. Therefore when I got this invitation, I was amazed and astonished that I was found eligible to come to the Palkhivala Foundation. It was an honour.

I thought I could've shared the concept of prison reforms but at that time the Bombay blasts hadn't happened. Since then, we're all reeling under the threat of terrorism. By the grace of God Tamil Nadu is safe, and I pray it remains safe but the key is what will keep it safe. I think that's the real challenge. Tamil Nadu doesn't live in isolation. It is national safety which is so critical which would have a direct or indirect effect on the growth, development and progress of Tamil Nadu.

I'm [a member of] the 1972 batch; it's almost now the 34<sup>th</sup> year I'm serving through. I've another three years active service to go. I decided to share my views in three parts: as I saw growing up in the service,

as I see it now, and where do we go from here. I'm trying to bridge my past and my present as you see but since I've been an insider I want to give you my perspective of policing as I saw, as I see, and as I see challenges ahead. I'm not here only to state the problems, I have concrete suggestions to make because I value the intellectual perspectives and capabilities and potential here in this part of the country; I thought this was the perfect place to make certain concrete suggestions which would have an impact on the police in the future.

As I saw policing from way way back in 1972, I saw duality where constantly a young police officer at the district level had many persons to report to. There was a constant duality till the police commissioner system came to Delhi in 1978. Till then, every time I had to do a lathi-charge or tear gas or disperse an unlawful assembly I had to have an SDM (sub-divisional magistrate) with me to sign. I needed that signature to say I didn't go wrong and had the support of the magistrate. I saw inadequacy, inadequacy of human resources, for instance, when I was running a district. It was probably one-eighth of what I needed to have and the crimes were so heavy; there was so much of inadequacy, (of) transportation... Then I saw hierarchy, it was a saluting culture, nothing but saluting. I get it from my junior and I give it to my senior and if I avoid that salute or I don't get the salute, it is punitive. So it was nothing but hierarchy.

There were outdated tools. I had wireless sets which had very limited range and I had to put them on the tree-tops to somehow increase [their effectiveness]. They were called Bell talkies, after the famous company of those days called Bell. Things have changed but I thought let me link the past a little with the present.

There were investigation issues, there was a lot of third degree. It was always from criminal to crime and not crime to criminal. It was always, I got the robber now you tell me what you did, rather than what happened and then I trace the robber. So it was a lot of third degree, looking for, finding out where the weapon is and where the property is. There was violence inside the prison, there was third degree and

very poor working conditions. I remember a lot of agitations were taking place outside Mrs Gandhi's house when she was the Prime Minister and I was the DSP. My first assignment was outside her house and we used horses to disperse the assemblies. Today the horses are more ceremonial.

At that time terrorism was raising its head, particularly terrorism from Punjab. I remember Punjab was burning and I think the change came in Punjab when the terrorists started to attack police officers in their residential centres; that shook them up. Police officers now realized that it is do or die; either they take them or they're killed and I remember this was a turning point. I belong to Amritsar and I remember those days how everything was ruined, my husband's lands were occupied by the terrorists, his entire business was finished. So we as residents and we as a family have seen the consequences of terrorism. This terrorism had spilled over into Delhi and as a police officer in Delhi those days I remember we used to sleep with boots on. I never used to take my shoes off because it was always a red alert. Transistor bombs had started coming to Chandni Chowk and Lajpat Nagar area.

What do I see now? As I see now, all these things are there, what I'm saying are not gone because some areas have still got those outdated Bell talkies. Let's look at Bihar, the backward areas of Bihar, some States are still backward in many respects, forward in many respects, but still backward in policing.

I don't say there is inheritance in most of the things I've mentioned but new things got added that didn't exist earlier. I did not see much of political interference during my time. The beginning of political interference started in the mid 70s; I joined in 1972 but they were isolated still, not major yet. We could still get the hold of criminals and put them behind bars and there was not much, though it had begun, political interference. But the new thing I saw, as I see now, is criminalization in politics and it is a very big challenge for police officers. Sometimes you may have a boss in the political world who

has a criminal record, who may have a history sheet in the police station, or has a case pending against him or her, whether it's white collar crimes, whether it's disproportionate assets, whether it's criminal cases. You have criminalization of political parties and some of them get elected, duly elected, because the election laws permit them, so they enter the legislative assemblies. This was in the time when I was growing up in service.

The next thing that I see has developed is the huge movement of human rights. Human rights swung to the other end completely. It was human rights more of the accused than of the victim, we still don't have the human rights of the victim. The accused has the right to silence, the accused has the right to connectivity, the accused has the right to bail, the accused has the right to reform, nobody talked about the victim and I think we still don't talk about the victim.

The fault came with the Human Rights Commission; in a way it was imbalanced. I wish it was human rights and duties commission; had it become human rights and duties you would have the victim covered. Every country just opened up human rights commissions, we never thought about human rights commission and duties. So that's where the imbalance came and there was a big movement in which some of them did a very fine job in restoring human rights balance, reducing third degree, but it also went a little off-balance by which it literally handcuffed police officers. It literally restrained police officers by not giving them the tools to deliver so this was the flip side of the coin.

I'm not against human rights, I'm just saying it went overboard. We can't even talk, although confessions or disclosures are made. The law did not change; while this human rights movement came, the law has remained the same. The Police Act is still the 1861 Act. I'm talking as a police officer: other things remained the same but, along with the outdated law of 1861, came new laws without the resources, new laws like the Narcotics Psychotropic Substances Act, you had crimes against women laws, huge laws which were supporting women's rights. What happened then was that prisons became full of these prisoners.

I was running a prison. I think one-fourth of my prison was full of drug traffickers and another two-third was women who had been involved in crimes against women. Without creating more prisons, without understanding and realizing that new laws also mean new offenders, new offenders also mean new prisons, new prisons also mean new correction policies and new staff. None of those things happened but we had new laws and we had to make arrests, we had laws even on environment, wildlife, things like that; children's laws concerning children's rights but along with it we had delayed courts. While we had long jamming in the courts naturally more cases were instituted, there were tremendous delays.

So, delayed justice, denied justice affected policing, there was a rise in crime, rise in crime of course brings in rise in terrorism. Rise in crime leads to loss of faith in policing, loss of faith in policing spreads larger insecurity, more fear, disrespect of policing. Now, more and more of politicization has started to decide who will be posted and who will not be posted, who is capable and who is not, who is red, who is yellow, who is orange, who is black, who is white. Every one of us started getting a colour, which colour do we belong to? Then came forensics, you had scientific data without police officers being trained or even having more forensic science background. We had very serious rape issues, again requiring more counselling centres which never came, trauma centres that never came up. The mobility of criminals increased. The police still had old rifles but the criminals had AK47s. They had the best of pistols and weapons.

When in police leadership positions, each one needed a godfather or godmother, otherwise how would they stay there? There were constant changes and postings. Many police officers started to put their family in one place, keep them bundled up and ready for two months here, one month there, two days here, one hour here. There is enough data in this country to show how police officers may have changed their postings twice on a single day, police children getting re-admitted [to school] again and again because of constant transfers and postings.

Well, this country also got better lawyers better at defence but not at prosecution. While we were dependent on the prosecution to speak for us, for the state, you got a battery of eminent lawyers who were good at finding loopholes in the prosecution defence so, while the investigation quality never improved, it never got divided between law and order. It continued to remain the same. The accused could buy the best of the defence with all human rights and with the rights of the accused. The police were dependent on their own overworked prosecutors so there was no match, it was a mismatch. They were the best of lawyers, educated, up-to-date, and an overworked prosecutor. We also had many more strikes, including lawyers' strikes. Over a period they literally took out one vertebra after another from the spine of the police. So, instead of having a strong spine, you have a spine which you can mould any way; it bends, it stands. That's the kind of police this country finally has been left with, this is the police today, this is the backbone we have today.

Leadership becomes dependent on external factors not only for efficiency but for acceptability. There's nothing to make the department stand up strong and so terrorism found a place. Nobody is safe today. That India has a rich and a booming economy is the big sore point for many other countries. Therefore, the way is to keep this country poor. You keep it poor you keep the police poor, you keep the police poor you keep the country insecure, you keep the country insecure, you keep it vulnerable. So this is what has been happening. It's a vicious circle. Each one of us as Indians has to understand this wake-up call. I've seen it from inside, I'm still seeing it.

So, I'll come to the third, the last portion of my presentation which is: Where do we go from here? My suggestions are as follows. I don't have all the ideas, I can't say it all. But it doesn't mean that other things are not important. I'm only looking at vitals and not desires. There are errors post-Independence, there are errors of policing, there are errors in the entire criminal justice system today, it's a huge error. Bahut udhaar hai. Iss udhaar to sambhaalte sambhaalte, next

generation be aajaayega. (We have a lot of debt, so much that it will be the turn of the next generation by the time we deal with it.) It is so much in debt, it has so much debris to clear, but being an optimist, being a believer that if all of us understand our roles, [I believe] it can be done. When we brought in reforms, we cleared all our dirty mismanagement, whether it was corruption, whether it was drug abuse, whether it was garbage, whether it was illiteracy, whether it was violence. Everything was attacked. We worked on every front so that in six months' time we are ready for change, we're ready for transformation. So, transformation wasn't happening one at a time, it was at many angles simultaneously. I left prison 10 years ago but even today they are asking if there are international conferences to show us this transformation. It happened without spending much money, yet we achieved the unachievable so easily.

We need to work simultaneously on many fronts. I think the priority before this country's policing is counter-terrorism. Murder investigations, robberies, white collar crimes go along but countering terrorism is very vital because that is hitting at the economy, at the Indian heart and at growth. My first strategy would be, take back the streets house by house, which means we need many more policemen on the streets. We need to come back to basic policing, beat policing, by which policemen know everything about every house. You might just say that in another five years from now where will more money come from? I will say, involve students who are doing correspondence courses. So that's my concrete suggestion. Involve students doing correspondence courses, let the police have a budget to give them scholarships and let them work with them and become student scouts as student police. They can work with these police officers going house to house to find out and continue to work sometimes in plain clothes and sometimes in uniform. But we have to start, we cannot wait. We can wait for the money today but India cannot wait for the moment. India has money but it needs to spend it in the right way. This is my first suggestion.

Secondly, you cannot have the same asset working over terrorism and murders and crimes simultaneously doing VIP duty and also doing law and order. Separation of these matters is before the Supreme Court. Some of these suggestions are before the Supreme Court in a public writ petition; the earlier the decision, the better. The judiciary has been a change agent in many other aspects in our country, so it's good if it were a change agent even in policing. According to me, that will be a turning point in this country.

Thirdly, we need to come up with a combined system of crime reporting. What happens now is that you go to a police station and the police station says, "No I don't want a report, come another day." Why another day? Because they want the crime entered because statistics matter, or they don't have investigating officers. We need a centralized crime reporting system. In America you report by phone, send an email, send an SMS, your report goes to the central crime control room. It then decides which police station it should go to and the investigation begins; that's the FIR. That means if it is worth investigating, the crime is reported. You don't have to go to the police station to report. It comes to the central registry in the central control room. That control room decides that it goes to a homicide squad, it goes to a theft squad, it goes to property crimes, it goes to the domestic violence unit. It has specialized people waiting to investigate those aspects of crime.

Let's say Chennai has a centralized crime reporting system. All that you report comes into that. So many go into murder, so many into investigations, so many are non-cognizable but that person (the complainant) gets an acknowledgement for the report. This enables an understanding of crime in Chennai, in the State, and in the country. This is the real data base. Today, this is missing.

So, I'm looking at a concept called combined control room (CCR) reporting which leads to the PCR (police control room), then the van goes, then the officer attends. It's CCR to PCR, it's centralized

crime reporting. You might ask me why are we not doing it because the figures will show how much is the real crime. The politician and the department both must get ready to declare their assets. To me this is hidden assets in crime which must become public. We must ask for a concept called CCR to PCR; PCR maybe a motorcycle rider who comes and investigates. A day will have to come, two years from now, *The Hindu* or *Indian Express* will give a great headline and it will be said that it is a New York police idea adopted by India. With this system, the public can see what's going on.

Then, we need intelligence units. These units have to work underground constantly. This is something the Prime Minister has been talking about in the last few days. We need to gear up our intelligence units which need to be strengthened and not consist of two-and-a-half people. This is where it requires investment but it requires a bigger budget because you have to pay, you have to buy intelligence, you have to pay for intelligence, you have to spend for intelligence. That is directly linked with terrorism. We need to categorically say that these are the anti-terrorist units. What is again required is State-wise interconnection of these units, countrywide. Terrorism needs to be made a federal crime, it needs to be made a federal crime today. If a terrorist blast in Bombay comes from a person from Nepal who lives in Madhya Pradesh and plans for action somewhere else, it is a federal crime. So will each State keep asking for permission to investigate, to arrest, to take into custody? By that time [the terrorist has] gone to Nepal, gone to Bangladesh, gone to Pakistan or flown out.

One of your senior trustees asked me when I was sitting and having a cup of coffee, is India a soft state? And I said when it comes to terrorism, India is a soft state and if we don't do this we will get softer and more porous and if we get more porous your lives will go. Maybe because we've got a long life we'll survive and even with this long life, some may get shot and get killed. They're hitting at people who are thinkers, who are making money. They'll not hit at the poor people, it is the middle class that will get hit. They will not go to the slums

and kill, they will come into richer houses, they will go to richer markets, they will go into the malls, they'll go into picnic resorts where the rich are and which are the wealth generators of the country or idea generators for the country. That's where the terrorists will hit. So we now need a strong federal law, a tough federal law, which comes straight to the point on intelligence collection, investigation, confessions, presumptions, trials... Everything should be in one law. Isme ye law usme ye law, idhar se ye liya udhar se ye liya. Nah! (One law here, one law there, take something from here, take something from there. No!) They need one law, a federal law. Give it another name but we must have a direct law which empowers the police force and for God's sake believes the police officer.

Also, we want to believe the terrorist more than the police officer! We have to take the risk of believing the police officer but I caution you and the police officer who is being trusted by the law, if he/she abuses that person should be court-martialled and sent to prison. Why would he/she want to go to prison for breach of trust? And if two people go, at least 200 terrorists will also go to jail. If two police officers have made a mistake and go, 200 terrorists also get convicted by the law and go to jail. At the moment nobody goes to jail. Now, these terrorists cannot be convicted because there are no eyewitnesses, there is no forensics. We are living in an illusion, only the police officers go round and round in circles and the media will continue to write headlines.

So, the law, this country, must decide how long it will distrust its own police officers. You distrust police officers, you believe criminals to be very good. All this could be laid down by law. Any police officer who commits a breach of trust will be court-martialled, like the army does. Such a clause can be set down.

Each State must develop a security securable index, we have GDP, we have Sensex. I also want Security Sensex. Let's hear that Security Sensex went up or down. That should be audited, not by a police officer, but by a management group developing a scalable security

index. I'm not going into details but you will see the list is so long, where do you stop? Because no one has done this in the last so many years. We left arrears and arrears and arrears and then we need to open up for research. Do you know how much the police spent on research in last year's research budget? India has 22 lakh police officers. We spent ₹ 25,000 crore on policing and ₹ one crore on research. That basically means no research. Thode thode jo research cells mein honge unki tankwa hogi, unki salary hogi, aur kuch nahi hoga. (A little would have been spent on salaries, and nothing else.) So basically we did no research. Do you know how much the army and defence services spent? Defence spent ₹ 2,804 crore on research alone.

Last but not the least, we will have to raise our voice individually to not divide this country communally. Any leader, any individual, however mighty or highly respected he/she may be, if he/she is trying to divide people by caste or religion, is a threat. These will become personal issues. You make public statements today with a communal issue, tomorrow you'll have a caste war. In a caste war people can pick up guns and say I'll settle it. It's the problem of having haves and have-nots.

So, if we as citizens have to secure this country for the future of our children, we as the speaking class, reading class, writing class, thinking class, communicating class, asserting class, earning class, influencing class, as individuals wherever we are we have to say we are Indians first and Indians last. We may have our needs but we will not let you divide. We can ask for our rights, we can assert our rights but not divide people to serve other purposes. Carefully read the interrogation reports coming to the newspapers and you'll know that the root causes of violence lie somewhere within this country.

I've not touched upon international diplomacy because international diplomacy will have a very major role in neutralizing the neighborhood. That is a class apart, but that will have to go simultaneously because if you have a peaceful neighborhood things become better but even if you have a peaceful neighborhood if you continue to divide the

country, you'll have enough terrorism inside the country. We'll have to create pressure groups using the right to information. Ask for information, ask for plans, ask for policies, ask for these to be advertised in the papers, discuss them amongst yourselves so that there is greater security and not an increase in insecurity.

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*Kiran Bedi (b. 1949), currently the Lieutenant-Governor of Puducherry (Pondichery), was the first woman to join the IPS. She is credited with implementing various reforms during her career and won the Ramon Magsaysay award for carrying out reforms at Tihar Jail during her stint as IG (Prisons), New Delhi.*

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# **The Indo-U.S. Nuclear Deal: What It Means to India**

**M.R. Srinivasan**

January 16, 2007

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Pongal greetings and greetings for the new year. First, a few words about Mr Nani Palkhivala, whose birthday it is today. I had the occasion to meet Mr Palkhivala for the first time in 1963-1964. At that point of time he was a tax adviser to General Electric Company (GEC) with whom we were negotiating this large project for construction of the first nuclear power station. The contract was going to be awarded to GEC, USA, and we had to appear before the Central Board of Revenue.

It was my good fortune to represent the Department of Atomic Energy (DAE). Of course, I had no knowledge of taxation law and here was Nani Palkhivala, an authority on tax law, and it was to do with some provisions relating to taxation in that particular contract. Things worked out very well.

Then, of course, I used to follow in Bombay the budget discussions that were annual events, much looked forward to by all the people of Bombay. At least on one occasion I attended the discourse of Palkhivala which was at the Brabourne Stadium. Believe it or not,

the entire stadium was full and people were listening from all the side streets and perhaps the Marine Drive parapet. He used to draw enormous crowds. Indian tax law is complex and you don't run out of problems and difficulties in understanding and even Palkhivala's lucid analysis probably didn't help people to get around taxation complications. Of course, he was an erudite man and those of you who have interacted with him will probably remember that all of a sudden he would start quoting from some book; it may be a recent book or an old book or a classic. [He would quote] several lines, even a full page without a single mistake. I've seen very few people in recent years with such an enormous memory.

Of course, he progressed from being a taxation lawyer to becoming a Constitution lawyer, and then participating in many important discussions in the Supreme Court on Constitution issues. Later, he became a diplomat and Ambassador of India to the United States during the Janata regime. He did much to re-establish good relations with the United States because there was a great deal of unhappiness after Indira Gandhi announced the Emergency in India so there was a healing touch that was required that he did very successfully. In his later years he became a student of Indian philosophy and culture. In fact, in many subsequent lectures, he would discuss the great heights Indian philosophy had reached and he used to remind those of us less conscious of our Indian culture. He was one of the early leaders of Indian business to be concerned with business ethics – what is now called as corporate governance. He was a great patriot and I feel honoured to speak at this Foundation.

First of all, we should look at the Indo-US nuclear deal in a broader and larger context. I'll start off with a bit of history. As you all know, the Hiroshima and Nagasaki nuclear bombs were dropped in 1945; the first demonstration test had taken place in 1944. This was followed by tests by the Soviets, Britain and later France, and much later by China in 1964. So in the 20-year period (1944-1964) these five nuclear weapon powers had all developed their nuclear weapons programmes.

Very early on, Bernard Baruch, who used to be adviser to President Franklin D. Roosevelt and later to President Harry S. Truman, was asked to come up with ideas for how to control nuclear energy because policymakers in the US felt that this new kind of energy required some new mechanisms to control its spread and usage, especially to prevent misuse of nuclear energy. But, of course, those efforts were premature because the Soviet Union opposed what appeared to be the United States's desire to take the lead role in exclusive control of nuclear energy. Therefore, the Baruch plan didn't take off.

Then in 1955, President Dwight Eisenhower announced the 'Atoms for Peace' programme, a desire on the part of the US administration for the peaceful uses of atomic or nuclear energy. We should really call it nuclear energy, energy with a nucleus... [It was felt] that the peaceful uses of atomic energy should be made available widely because it was already known that there was a big potential for producing electricity from nuclear energy, and [the potential for] many applications in health, medicine, agriculture and industry, and all these uses should be promoted without at the same time allowing large-scale misuse in the direction of nuclear weaponry.

Of course, there were also expectations in those days that nuclear power would be cheap to meter. I remember myself having seen Dr Homi J. Bhabha's projections. Of course, this was made in late 1958. In the period 1955-60, he had forecast that nuclear power would cost about two-and-a-half paise per unit. In those days all other forms of energy cost about 3 or 4 or 5, less than 10 paise. You must remember the value of money in those days was different from what it is today. In 1955, there was a major conference, the first conference, held in Geneva on the peaceful uses of nuclear energy, presided over by Homi Bhabha. Dr Bhabha had, then and in 1958, already analyzed the energy situation of India. He found that we depended too much on wood, cow dung and agriculture waste as the source of energy. In those days it was like 75 per cent; even now it's 40 per cent plus. We cut trees indiscriminately just for domestic fuel, cow dung is a very important

nutrient for the soil, so we still depend quite a lot on these traditional sources. Bhabha also said that coal was only available in central and eastern India and had to be transported over long distances. So you burn good energy to bring that coal to the consuming centres. [He observed] that we shouldn't continue to burn too much coal; besides, the economics was not attractive.

The third thing he observed was that we didn't seem to have that much oil and gas, that we would continue to depend a lot on imported hydrocarbons, and finally he said that the uranium resources are not a lot but [we had] a large amount of thorium and our plan should be to find a way to use this thorium. Then he outlined what was called the three-stage programme. I'll come to that a little later. In 1963, India and the US entered into an agreement on the Tarapur Atomic Power Station and I must say here that Dr Bhabha's role was not only that of a scientist, he was also a brilliant negotiator. The agreements with Canada and the US are brilliant pieces of negotiation because those agreements reflected what you would call as symmetry. For example in the Canadian agreement in Rajasthan (using heavy water as the moderating material and natural uranium), not only was India agreeing to put two reactors under international inspection, the Canadians also had to put their reactors under international inspection. In fact we even sent inspectors to see that the fuel used in those reactors was not diverted. The French at that time found that the Indians were coming in the way of their getting their plutonium for some other purposes. The equivalent principle was there even in the Tarapur agreement.

What is more, the Tarapur agreement also had a built-in, I would say cast-iron, assurance on supply of fuel for the entire life of the reactor. This agreement signed in 1963 foresaw that the US was obliged to supply the enriched fuel for Tarapur until 1993. But of course that didn't happen, I will come to that in a moment. Then, there was this 1968 non-proliferation treaty (NPT). The US along with the UK and the Soviet Union prepared this treaty which effectively said that the

five countries that had had the nuclear test before January 1, 1967, – they were then the five permanent members of the Security Council – would be looked upon as the nuclear weapons powers and that the rest of the world would not be allowed to become nuclear weapons powers. It was a bargain which initially at least had some degree of equity because the agreement said or the treaty said that the nuclear weapon powers also would over a period of time de-nuclearize and that the other countries would not acquire nuclear weapons but that didn't really happen at all. The reality was that from the 1960s or 70s, the US and the Soviet Union went into a huge arms race, building thousands of nuclear weapons. Even now both of them have more than 10,000 nuclear weapons each. So this is what is called the vertical proliferation by which the weaponry with some of the states increased enormously.

What the treaty did was that it succeeded in preventing other countries from acquiring nuclear weapons. In 1967-68, before this treaty was finalized, Vikram Sarabhai who succeeded Bhabha who had died in an air accident in 1966 and L.K. Jha who was then the secretary to Prime Minister Indira Gandhi, were sent on a mission to the leading world capitals – Washington, London, Moscow and other such places – to find out what India's attitude should be on this treaty. Of course, they raised the question of security, of what would happen to India in case a nuclear or non-nuclear state threatened its security. They found there was no answer to this question and on their coming back and after the discussions that took place internally, India took the position that it would not join the treaty. That was a decision taken in 1968 and we continue to hold that position. As of now, only India, Pakistan and Israel are outside this non-proliferation treaty.

Now for the next important set of issues. The Pokhran 1 test of 1974 was called a peaceful nuclear explosion because in those days the US and the Soviet Union had actually been using nuclear explosives for peaceful applications like putting out oil well fires or loosening up the gas or oil held in the substrate. The UN had also considered what

you call *in situ* leaching of some minerals deep down by fracturing the rock with nuclear explosion. Since they were doing such work, it offered India an opportunity to go some way in that direction without actually calling it a weapons test. That was in 1974.

Soon after, there was the embargo by the US and Canada on nuclear exports to India and our own projects dependent on equipment and materials imported from overseas, suffered great delays. The US stopped supplying fuel to Tarapur. It later allowed France to take its place as the substitute supplier until 1993, after which the Soviet Union, China and Russia have been providing fuel to Tarapur. However, India moved ahead with its own nuclear energy programme in the process building up an entire nuclear industry. This is a tribute not only to the scientists and engineers and technologists of the DAE, but to the people who ran our industry for the enthusiasm with which they took on such complicated jobs for the first time. It was a learning period, delays and all. Nevertheless, it succeeded in building components for many of our nuclear power units, so we completed the two reactors at the Madras Atomic Power Station in Kalpakkam, the FBTR, small fast breeder reactor that is, and later on we launched work on reactors in Narora, Kakrapara and elsewhere. And all the fuel cycle facilities required, namely for mining uranium. We have very low-grade ores, with only some 0.03-0.04 per cent uranium, so you can imagine the large amount of rocks that have to be broken up to extract this small percentage of uranium. Then there is the plant for separating uranium and other materials which are not good for the reactor, and making nuclear fuel, making zirconium components – you know we extract zirconium from the beach sands of Kerala and Tamil Nadu. So all these facilities, including production of heavy water, had their own technological problems, delays, costs and so on. Nevertheless, we succeeded in developing all these fuel cycle facilities.

What was the scenario in the 1990s? Due to the acute financial crisis in the 1990s, and I am referring to a period when India had to send away its gold to London, money allocations to the atomic energy

programme were also reduced because incidentally at that time even our conventional power programme suffered a great deal. Therefore, what happened is that Tarapur units 3 and 4, our largest reactors now in operation (540 MW), had to be deferred. Some of the uranium mining had to be stopped and Kudankulam project was delayed.

I must mention here that it was my initiative, when I took over as chairman of the Atomic Energy Commission, to push through this agreement with the Soviet Union because until that time we were saying that we would do it all on our own and we didn't need anybody's help. But I took a different view as I had an engineering background and had experience of all the power systems in the country. Initially it was very difficult to enter into an agreement with anybody to import reactors without India compromising on its nuclear independence, weapons development, tests or re-stage programmes. Eventually it turned out that we could enter into such an agreement with the Soviet Union. The credit for that goes to Prime Minister Rajiv Gandhi and President Mikhail Gorbachev who had a very good equation. This agreement was signed in 1988 but that again was effectively put back for almost 10 years because of the fact that on the Indian side there was hesitation to commit some money, the Soviet Union broke up and the Russian nuclear energy industry was in great disarray. So anyway, that was restarted only in 1997 and even the reactors that were deferred were restarted.

Incidentally I had by then become a member of the Planning Commission and I found that my own papers that I had submitted in 1990 or so were pending for disposal in 1996 or 1997. That's the way things run!

However we got started, and Kundankulam now will probably go into operation in two years, and the Russians are keen on putting up some more units. In addition to this our own heavy water reactors which initially had problems began to operate.

Then came the Pokhran 2 test in 1998, a decision taken by Prime Minister Vajpayee. You must remember that the tests were carried out

with three months of his taking office which goes to show the high level of readiness on the Indian front. Many people thought that the heavens would fall. Of course, sanctions were imposed in 1998 but they did not hurt India much since the economy had already become more robust on account of the reforms introduced by Narasimha Rao and Manmohan Singh.

The US began to look at India in a completely new light, not as a problem state but as a state which had actually something to contribute in the management of the region and in global relationships.

In the Clinton years there was some degree of movement in the next steps towards this strategic partnership. One issue related to dual-use technology, that is to say that some items or equipment supplied for ostensibly peaceful purposes, could also be used for weapons development. In the 1990s, the US not only tightened exports to countries that didn't sign the NPT but also managed to get the so-called Nuclear Suppliers Group (NSG) – consisting of some 40 countries – to take extremely rigid export control measures so as to deny new entrants the opportunity to develop nuclear weapons.

In the interim, because our reactors were working well we started experiencing uranium shortage. The reason is that we do not have large reserves, and what we have are of low grade.

In addition, with the economy growing at 7-8 per cent, the electricity generating capacity was woefully low. In any five-year period the largest addition has been 20,000 MW, that was in the 7<sup>th</sup> Plan period. The only silver lining is that two ultra-mega projects – 4000 MW coal-fired plants – have been announced. Other constraints are low quality of coal, transportation issues, concerns over global warming, and the high price of natural gas. By the time we started looking at liquefied natural gas (LNG), the international prices had more than doubled, altering the economics drastically.

The options on the electrical front have receded and it has become inevitable for India to look at nuclear energy in a different way. Even

before the discussions between Dr Manmohan Singh and President Bush took place, some of us had prepared a forecast of the electricity situation in 2050 which said that the total electricity generating capacity must increase 10 times, which meant that 130 GW should go up to 1300 GW, and nuclear capacity which is a part of that has to go up from 3 GW to 300 GW. Even then 40 per cent of our energy would come from coal leading to carbon dioxide build up, etc.

In looking at how to expand nuclear power capacity in a big way we have to have access to currently available civilian nuclear technology around the world. Of course we have been talking to the French and the Russians and they were all keen. But it required the US to change its laws because they were the initial promoters of the NPT and hold the key to all the control measures. The NSG is also dominated by the US and unless the Americans take the leadership and say you can change the rules of the game, the game will be the same as it was frozen.

What happened in July 2005 when Prime Minister Manmohan Singh and President Bush met was that they agreed the time had come to look at the situation in a new way, that India could not be asked to dismantle its nuclear weapons, that India had a strategic place. But we cannot access civilian nuclear technology, that is, technology for building nuclear power stations. In the mean time, the Chinese could be looked upon in some ways as a potential adversary, or real adversary in the past and potential adversary maybe in the future. They had access to civilian nuclear technology from the West because they are a part of the NPT as a weapons state. It took the Americans and the Chinese some 13 years of negotiation to get into an agreement but in the meantime France, Russia and Canada had already begun to allow the export of their reactors to China. China has more nuclear power than India in term of MW capacity although we have got more reactors of our own design and construction. We have done it on our own whereas they are able to import from France; now they are getting some reactors from Russia, Canada and the US.

So the July 2005 agreement was to find a way for India to access civilian nuclear technology from other countries, including the US, France, Russia, maybe Japan, Canada and so on. The bargain then was that India would undertake to place a number of its own nuclear installations which are outside international safeguards, under international inspection, and these are all the reactors that I've had the good fortune of building. We have built them using our own technology and through our own endeavour.

The Americans then said that they would try and change their legislation. The American legislation forbids cooperating with any other country which has nuclear weapons and which was not one of the five nuclear weapons powers and it also forbids cooperation with countries that did not place all their nuclear installations for international inspection. Now these conditions got refined in March 2006 when President George W. Bush visited Delhi. The bone of contention was whether the prototype fast breeder reactor, or the fast breeder test reactor would be under the safeguards. Now that is a contentious matter. India said no, we will not allow that to be put under safeguards. The reason is that the prototype fast breeder reactor is currently one of the large development projects anywhere in the world in that area. It is our largest hi-technology development project costing some ₹ 3,000 crore or more and is based on our own knowledge inputs, with our own industries making all the components. Our people have done the designs and it is under construction now. We feel that just like other advanced countries, we will also have to preserve our own intellectual property. And although the inspection from the top international agencies is often considered to be not at all unpalatable, the fact of the matter is that once you allow inspection, there is a certain degree of loss of intellectual capital. We also decided that our heavy water reactors would be kept outside the safeguards: the Bhabha Atomic Research Centre in Trombay would not be available for inspection, nor would the Indira Gandhi Centre for Atomic Research, Kalpakkam, and so forth. That was a bit of hard bargaining that took place. But at the end of the day, there was certainly a great

desire on the part of President Bush personally to come to terms with India, a desire that was also reflected by Prime Minister Manmohan Singh, and people from the Indian side said that we should somehow find a way out.

Some people would have probably argued, and in fact it was argued in public also: Why are we looking into any agreement at all with the Americans or anybody else? Why don't we go on our own? They say we have got all the thorium in the world, and you people say you have already developed technologies, so why don't you move on that basis and continue the programme independently? The problem is, as we move ahead in the technology development process, it is increasingly becoming an international endeavour. Now if you take a look at any other technologies, whether electronic, computer, aircraft or whatever, the old idea was that each country develops everything on its own and happily continues on that basis. But now technology has become truly international, science certainly too, and therefore growing in isolation isn't the best of options.

What are the consequences if we grow in isolation? We will grow slowly. For instance, in December, the present chairman, Anil Kakodkar, convened a meeting of former chairmen of Atomic Energy Commission and leading scientists holding strong views against this Indo-US agreement. When somebody said, "Why don't we continue the same old way?" I asked, "Okay if we do that, what is the maximum you think we can get in nuclear power in 2050?" After some considerable amount of permutation, the answer came: "We can produce 50,000 MW" given favourable circumstances. But then when we pointed out that what we are looking at is 5-6 times that amount, then they said no, look at the other options.

But there are no other options, not easy options. They are coal, gas, solar, wind. All these things will not give that kind of output. Are we going to stop this country's economic progress? We know large parts of India remain dark and many people don't have pumps to lift water, they don't have electricity for doing many things that could be done

more easily without the muscular power being used so much. So we know it is most important for us to maintain nuclear independence, or other types of independence. Well, some of us, like people sitting in this room, may get away, but the large masses of this country will have a very raw deal indeed. Very important is input energy, apart from things like water management, agriculture recovery, and things like that.

If this agreement were to go through, what we would like to do is to import some number of enriched uranium reactors. It could be from the US, although the US nuclear industry has been on a long holiday. But actually nuclear industries in France and Russia are more aligned and they would like to supply nuclear reactors to us. We would also have to import enriched uranium because we don't make that, although we make some in Mysore for our strategic programme for the submarine, we don't make it for the civilian programme because you will have to have large facilities to enrich uranium in an economic way. So we would like to get that uranium, run those reactors and supply electricity.

We would also like to import natural uranium because we are now ready to build these heavy water reactors in good time and in large sizes; the last big one was 540 MW in Tarapur. Now we are ready with the design of a 700 MW reactor, and all that we are waiting for is to ensure we can get uranium. We can build may be 10-20 of them in fairly quick time. Our industry is ready. I must compliment our industry for making nuclear components much cheaper than elsewhere in the world. We've got some of the lowest cost nuclear power in this country because they are all made in India. Similarly, even if you go to this stage of importing reactors, if the agreement goes through, even then we will try and see that we do localization.

We use indigenization as a bad word because the word indigenous has got various connotations but localization we could say because we also make those components for the imported reactors. What is happening is that China and India are getting to be the preferred manufacturing locations even for high technology components, for example, to make

huge forgings and castings required for these reactors. Currently they are made in only two places: France and Japan. But for larger scale production, which is required if there is a big expansion of nuclear power, the countries that are attractive are China and India. So these things could happen. But now, the status of this agreement is very important because there are two views. The other day, the American Ambassador said that the US has delivered the legislation and now it's for India to go ahead and conclude the deal. Unfortunately what has happened is that this legislation, going under the name the Hyde Act, has created a lot of problems. While the official American position is that the Bill is fully consistent with the agreements reached on July 18, 2005, and March 2, 2006, it is not so as we see it.

There are four key issues in so far as the departures are concerned. One is the right to re-process imported fuel. Re-process means once you put nuclear fuel inside the reactor, some part of it gets burned. It actually goes through the nuclear process of fissioning but not all of it gets burnt at the same time. There is a fair amount of energy potential in the residual material. When that spent fuel is put through a very complicated chemical process, you can recover plutonium as well as uranium. Both can be used as fuel.

Now in the Indian programme, this re-processing is key for the eventual construction of our fast reactors and for thorium utilization. President Jimmy Carter took the view that this process is what is going to confer the ability to make nuclear weapons on other countries because a separate plutonium is now the key to making weapons unless you have very highly rich uranium content. And so, as he is a very moralistic person, he said that even the US would not re-process the spent fuel, leading to the possibility of his asking other countries also not to re-process. Even at that time, many other countries like France, Russia, Germany, India, all disagreed. We said no, if we are going to only use uranium on what is called the once-through basis, that is, use a certain amount of uranium fuel for a reactor and leave it as a waste, then a very large amount of energy would be lost and the

contribution of nuclear energy would not be large. Therefore we say re-processing is key to large-scale energy availability through nuclear energy. Now the Americans say, “No, no, no, you leave this issue alone, why do you raise it now?” Some of the friends of India among the Americans, they say don’t raise the issue and muddy the waters.

The next question is on the assurance of fuel supply. If we import reactors that use enriched uranium, we want to be sure that those reactors will receive the enriched uranium fuel for their entire lifetime. Now we have put such a clause in the agreement, but what happened is, the US said after 1978 that due to their domestic law, they were not able to fulfill their international obligation. This is an international agreement between two countries, it is supposed to survive changes in domestic law. This is a big legal battle, but the Americans, being a superpower, said no we can’t do that. Fortunately, later they encouraged the French to find a way out, that’s another matter. But large nuclear power stations cost a lot of money and we need the assurance that fuel will be supplied for the entire life of the power station. These are the issues where there is confusion.

Thirdly, India agreed to put its future civilian nuclear installations, that is, nuclear reactors and associated facilities, under international safeguards on the assumption that India would have access to full civilian nuclear technology. By this what we mean is we wanted to be able to have control over enrichment, fuel-making and re-processing and also on heavy water production. The Americans say that we don’t categorize these as civilian nuclear technology because they have elements in them that can encourage weapons development. But then we know that the American definition is not the definition used by other countries. We certainly know that the French, the Russians take a different view because in the case of re-processing, in the agreement concerning the Kudankulam reactors which I negotiated, initially they were asked to take back the spent fuel, the burnt fuel, but later it became impractical because it is very difficult to send highly radioactive substances across the seas. Then they said okay, we give

you the right to re-process and use it under safeguards. That's a fair agreement. The French also had been saying, yes we don't have any problem, you can re-process our enriched uranium after it's been to the reactor and use it under safeguard.

There is another important question. You see in 1998, within days of the Pokhran 2 test, Prime Minister Atal Behari Vajpayee announced two things: He said that first, India would adopt a no-first-use policy. Our nuclear weapons are only for defensive purposes. Only if somebody were to attack our country would we retaliate. This created a lot of problems in the strategic community because it requires India to keep what is called a second strike capability. You assume that somebody may come and destroy some part of your nuclear assets and then you should still be able to retaliate so that adds to the size of the arsenal, how you dispose it and all. Anyway I won't discuss that now. The second point Vajpayeeji made was that we are going to place on ourselves a voluntary moratorium on tests, we are not going to have another test. But it is a moratorium, not a ban, and therefore it is dependent on certain circumstances that prevailed at that time.

For instance, if the global nuclear environment is what it was in 1998, then we would not have any more tests. Suppose the US carries out a test. In fact, US designers are trying to design new weapons, they call it the reliable replacement warhead, and if their policymakers are going to push them to have a test, and China were to have a test, and somebody else were to have a test, and Pakistan were to have a test, then how can we bind ourselves in a bilateral agreement with the US that we are not going to have it? So these are very important questions.

Then there are some declaratory issues in the Hyde Bill. One of them is that it is the policy of the US to get India, Pakistan and China to stop fissile material production for weapons purposes. Now we say that it should be the policy that everybody in the world should stop making fissile material for weapons, not just only these three countries named. Now it also goes on to say somewhere else that the policy of the US is that in South Asia, nuclear weapons should be capped, frozen or

whatever. But here they use words which effectively say in South Asia – that is really demeaning to India and Pakistan – that we should denuclearize in terms of weaponry. We say that we are committed to universal nuclear disarmament and if everybody does that, then fine, but why single out India and Pakistan? So these are contentious issues and Prime Minister Manmohan Singh in his address to Parliament on August 17<sup>th</sup> has specifically drawn red lines in the agreement and all these issues have been addressed by him. The Prime Minister has taken the position that the Indian strategic programme should not be impacted in any way, nor should India's three-stage development programme. But as things stand now, the Hyde Bill and the objectives set out by the Prime Minister don't seem to converge.

Some analysts in India (I may mention a couple of names because they write on these things frequently) such as K. Subramaniam have said that we are not bound by the Hyde Bill. It is a piece of American legislation that operates only in America and we are only guided by the bilateral agreement which goes under the name 123 because there is a particular article in the Atomic Energy Act of the United States of 1954 which is section 123. So that's the agreement and we are only going to be bound by that. Similarly, the lawyer Abhishek Singhvi, the son of L.N. Singhvi who was recently an Ambassador, said that the Hyde Bill is like a private member's Bill and we are not governed by that.

I think people like him are misleading the country. It is not a private member's Bill. It's a Bill that regulates the US government's freedom to negotiate an agreement and the US government is bound by the provisions of the said Bill and this is an incontrovertible fact. It is true that at the time of signing the Bill, President Bush said he has taken exception to specific portions of it. Of course, we can negotiate the 123 agreement in good faith to put all our concerns into it and find out where we stand. On the one hand, India is interested in getting out of the nuclear apartheid regime that we got into through no fault of ours. At the same time, it is very important that we do so

on terms that are consistent with our own basic position, namely, that our nuclear independence in terms of our ability to progress and our three-stage reactor programme are not affected.

Now, some of our American friends privately argued that, you know with these things, once we start working the environment will gradually improve. But they have to agree with me that we are talking about a long-term agreement and some of these provisions go into perpetuity. For instance, the safeguards for civilian installations. I do hope that some way is found but as of now it is still an open game although some of our American friends have been saying that they have delivered and it is for India to move ahead with its nuclear capacity and also contribute to the issue of global warming. I think that if India and China continue to burn coal in large amounts, the planet's future is really going to be jeopardized. There is a shared responsibility, not only with industrialization, but also for these two large countries to see that the global environment is managed in a more benevolent manner. Yes, we would like to see this agreement go through but only on the basis that the issues raised by the Prime Minister on August 17, 2006, are adequately addressed to India's satisfaction.

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*M.R. Srinivasan (b. 1930) is a nuclear scientist and mechanical engineer who played a key role in developing India's nuclear programme. He was chairman of the Atomic Energy Programme and member of the Planning Commission. He was also founder-chairman of the Nuclear Power Corporation of India. He was awarded the Padma Vibhushan.*

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# Judicial Activism: Are Courts Overstepping Their Limits?

Harish Salve

September 8, 2007

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The occasion is momentous for those of us who have grown under Mr Palkhivala's shadow, who were drawn to the legal profession by him out of sheer admiration for the man, and who were so blessed that we got a chance to work with that colossus, be with him, spend cherished moments with him, in which we got to see the person more than the lawyer. When a function is held in his name, it becomes difficult to speak. Every time I think of dear Nani – that's how we used to affectionately call him; he used to get very irritated when I called him sir; he said my name is Nani, not sir – every time we think of him, it is a very emotional experience. My last meeting with him was a very emotional experience. The man who used to take milliseconds to respond to the most complicated questions regarding the Constitution, was very unwell before he passed onto a better world. I asked him whether I could call on him, for two reasons. I had been made Solicitor-General and thought the first person I should pay my respects to was my guru. Also, I was carrying a card from the Supreme Court Bar Association that was holding a function for him

which he could not attend. He said I will let you know, hold on. And for five minutes, there was complete silence on the phone and his niece come back and said he was lost. He will come back and answer, please don't hang up because he gets very upset. I said if I have to stay on the phone all night, I will. There is no problem. And it took him five minutes to tell me, yes, come in the evening.

Not that he was busy or doing something, but that is a moment I will never forget. From a man who used to in a millisecond answer the most complex constitutional questions, to five minutes to say whether I could come and visit him. I visited him, he again invited me for dinner. His memory had compressed. He thought I was N.K.P. Salve, who was his friend, and then when he saw me he embraced me. He had written a letter to me when I became the Solicitor General, a letter which I had framed. His affection despite his ill health was there. We were told to come at 6.30 for dinner and leave by 8. And there's no way he would let me and my wife leave. We were with him till 9.45 and the doctor said, what the hell, we haven't seen him smile or laugh after such a long time, please stay. That's my last impression of him.

Mr Palkhivala was a genius in every way. Whether he was mesmerizing 2/3/5/9/13 judges of the Supreme Court, or whether he was mesmerizing audiences who stood in Azad Maidan hearing him speak about the budget in the pouring rain. Hearing Mr Palkhivala, not just the approach to law, not just the skills of the advocacy, I can never forget when we had the privilege of working with him in *Minerva Mills, 1979*. Every time the judges would resist, Mr Palkhivala would drop the point of law and get back to his rhetoric which was mesmerizing. He would raise the temperature in the court and the same law point put across went through like a knife. That was Palkhivala as a lawyer.

But this colossus never lost his common touch and that is one value that all of us who were close to him have learnt. If he invited us to dinner, he would come to the elevator, take us down, open the door of the car. Once when we had walked down from the Oberoi to his house, he lived very close by, he walked us back to the hotel. When

my wife told Mr Palkhivala, this is almost embarrassing what you do for us, he simply smiled and said, Meenakshi I have seen your husband when he was two-and-a-half feet, and now he is very tall. This was the man the world wanted to meet and this is the kind of affection he had for those he was most fond of.

In one sense, if we rewind to the period 1969-1973, although the phrase 'judicial activism' was not popular in India, our Supreme Court was blamed for what is today called judicial activism. And who was the man responsible for it? The great Mr Palkhivala. Bank nationalization in 1969, the privy purses case in 1970, and the Keshavananda Bharati case (the biggest act of judicial activism) in 1973. That is when the government had a confrontation with the judiciary and asked what the judges were doing. They cannot decide what nationalized banks should do. It is not for the judges to decide whether we should or should not pay privy purses. And if in Parliament, two-thirds of the members present and voting decided to amend the Constitution, who are these unelected judges to stand in our way! It was just that the phrase judicial activism was not coined then, but the allegations were the same. And we had the good fortune from those very days of hearing his side of what it should be.

I will start with one of the conversations we had. The language, the expressions we used those days were very different, but translated into current terms what we discussed was judicial review. And he gave an answer characteristic of himself in a short, crisp sentence. I have had the good fortune of reading a lot of literature on this subject and I don't think anybody has improved on that. He used to always teach us that brevity is very important when you speak. His favourite example was Shakespeare: ["brevity is the soul of wit"], he said the rest is silence. Could anybody improve on it? He said, what is all this fuss about? Judicial review is control by one Constitution branch over the other two. I don't think there has been a better definition of judicial review. It is meant for that. Judicial review is meant to give control to one of the constitutional branches of government over the other two.

It sounds strange that in a civilized society when we have worked so hard to evolve models of democratically elected government, why did we think of constitutional courts? One can understand that courts are the arbitrators of disputes between two private individuals. Why do we need constitutional courts? One of the finest answers we get is in one of the federalist papers quoted in an article of the *Harvard Law Review*: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.” But since neither are we angels, nor has anybody today accused those who have ruled us to be angels, we need control.

This kind of judicial review is as old as constitutional government itself. In fact, in an article in the *Duke Law Journal*, it was put very well. It said, “...the Framers (and this is for the American constitution) were virtually obsessed with a fear – bordering on what someone uncharitably described as paranoia – of the concentration of political power ... In structuring their unique governmental form, the Framers sought to avoid undue concentrations of power by resort to institutional devices designed to foster three political values: checking, diversity and accountability.” This is the heart of judicial review.

What does it really mean? There is another related concept which we have to keep in mind, which also is one of the jurisprudential bases of judicial review. This is the concept of separation of powers. Why do we need separation of powers? Why do we need an independent judiciary? Nobody was worried about judicial independence if it was only to decide disputes between A and B. Conceptually, no government would interfere in what the judges decide in a contract act dispute or property dispute or a private dispute or in a criminal case involving private individuals. That is not what independence of judiciary was fashioned for. That is not why separation of powers was conceived. Separation of powers was conceived because they said that there must be an institution free from the government’s pressure so that they can stand up to the government of the day. Now if judges

are to stand up to the government of the day, the real relevance of such separation is when you have a power of judicial review. If you are going to be checking executive government, let's leave aside for a moment checking legislation, but if you are going to be reviewing governmental action, that is when you need to be insulated. So that you can do your duty fairly and fearlessly.

So what does then judicial review mean? It means what I say, what Mr Palkhivala said, a co-equality of institutions. Defining a court as a constitutional organ also of governance. And this is not a newfangled idea. There is an impression one gets reading a lot of comments nowadays that judicial review is something which has developed overnight or all these are notions that have been developed overnight because the judges are hungry for power, looking into the nooks and crannies of the law, and discovering principles by which they can run the government. If you trace it back to its origin, you realize that it is as old as the first concrete thought on what organized society should be. Separation of powers was discussed by John Locke and Montesquieu in the 17<sup>th</sup> and 18<sup>th</sup> centuries. So there is no question of there ever being a sort of newfangled idea of judicial review which the judges have grabbed from nowhere or created as a device to try and get their foot into the door and share the spoils of governance, as it is suggested.

If judicial review is the power of one co-equal branch to check the other two, do we need to fear the court? Because then the common argument is, oh my god, here are a group of unelected people wearing fancy clothes and sitting in this air conditioned ivory tower who are going to decide what should be, instead of us, elected, put in power, and the civil servants, too, of course. Do we need to fear the court? As early as Alexander Hamilton's federalist paper, the judiciary has been described as the weakest branch of the three [branches of] government. Why? Because they had neither the sword nor the purse. What do they have? They have one and only one thing that makes them today the most feared branch of government. They have public opinion resolutely behind them.

There have recently been at least two or three occasions when one of the law officers in the government has been very rude to the Supreme Court judges. I must say to its credit, the government said that he must apologize. Why? No government acts out of pure goodness of the heart. I think we have dispelled that notion long time back. Because they fear that it is ultimately public opinion which is so resolutely behind the Supreme Court of India today. That anybody who insults the Supreme Court today is actually creating trouble for the government rather than the court. When Thurgood Marshall, one of the greatest chief justices of the US Supreme Court, said we have the power to strike down the law, everybody sat up stunned and they said, you mean to tell us that unelected judges are going to say whether a law can or cannot be made?

Today, I don't think Americans can even dream of living in a country where the Supreme Court does not have the last word on the constitutional validity of the law. In America, this debate does come up every now and then. In fact, recently Prof. Mark Tushnet wrote an article saying we must amend the constitution and take away the power of the judicial review. The debate rages in that country. But, even in America, the importance of this assertion by the Supreme Court that it will have the last word when it comes to the constitution, has redefined American society.

There is a very nice piece written by Prof. Gordon Wood, a professor of the history at Brown University. He says, when he writes on the origin of judicial review, that the Marshall court never advocated a role for the courts that we see today. He is saying this of America. This allegation of the court expanding its role is not peculiar to India. It would never have agreed with [former US solicitor-general] Archibald Cox when he declared in 1967 that judicial review calls upon the court to go over the very social, political and economic questions committed to the congress and the state legislatures. Cox was against this development.

The 20<sup>th</sup> century has witnessed an extraordinary expansion of the court's power, an expansion which has gone beyond anything that Marshall or his colleagues could have imagined. And yet, somehow or the other, Marshall's place in history remains undiminished. Why? Because he, for the first time, asserted that the court, the constitutional court, is a co-equal branch which has the right to invalidate anything unconstitutional even if it be a law. That was the turning point, the defining moment of the US Supreme Court. In India, we fortunately do not have this debate of judicial review. We created judicial review under Article 32 as a Fundamental Right. And Dr Ambedkar said, this is the soul of the Constitution. Every time the Supreme Court says you will not entertain a 32 petition, the lawyer says this is the soul of the Constitution. They don't understand what Ambedkar meant. What he meant is that judicial review, which means that the court will have the last word, is the soul of the Constitution. That's the faith we want to repose in this organ of government. The constitutional court.

The Supreme Court has had three defining moments like *Marbury v. Madison* (5 U.S. 137, a US Supreme Court case that established the principle of judicial review in that country) where Chief Justice Marshall's court declared that the government of America (the executive and the legislative) is not an uncontrolled government. Our Supreme Court declared in 1973 that the Indian parliament is not an uncontrolled parliament. Even if you amend the Constitution, there is one point beyond which you will not go. That is, to my mind, one of the most defining moments of the Supreme Court. Why? Of course we can keep discussing whether the Supreme Court should have evolved a nebulous concept such as the basic structure, and whether the court should have invented the basic structure.

The legal debate can go on but let's stand back and see the sociological definition of the judgment. What did it do? The court said, you cannot remove this Constitution from existence. Deliberately and carefully the court created a somewhat amorphous doctrine of basic structure. Why? Because the last word then remains with the court. Is that

the right thing to do? The answers to such questions, to borrow the expression used by one of the authors of the federalist papers, should be based on history rather than reason. He said, certain questions should be answered empirically rather than rationally.

Let us turn back and see where we are in 2007. Every institution evolves. Has the Supreme Court's performance been blemish-free? Not at all. One of the most powerful arguments I have ever heard in court is by Mr K. Parasaran in the Supreme Court. Responding to an argument that the court is the last bastion of Fundamental Rights and the ultimate guardian of civil liberties, Mr Parasaran – I think he was Attorney-General then – told the court, “Once you were called to the test, and that one time you failed.” He said the strength of a man is to stand up in war and face the bullets; the judicial equivalent of that was standing up to the Emergency. And what happened we all know. It's a chapter that even the judges of the Supreme Court would like to forget.

Practising lawyers know that the judgment in Shiv Kant Shukla [when the imposition of Emergency by Indira Gandhi in 1975 was challenged, the court declared that during Emergency, Fundamental Rights were not available to citizens], has a lot of legal propositions very eruditely set out apart from what it decided. In the 30 years I have been in the Supreme Court, I have never seen anybody cite that judgment. And once when it was cited for a proposition of interpretation, Justice S.P. Barucha said, don't cite that. That is not a judgement meant to be cited.

No courts have been blemish-free. Let's see how the courts began in England. The courts began in England as an arm of the crown. And the injustice handed out was the worst of any kind. They were minions of the king. It took someone like William Murray, First Earl of Mansfield, to develop the reform of English law. He developed the doctrine of public policy in England. In the US too, people were suspicious of judges because they were identified with the colonial governors. It was only at the turn of the 18<sup>th</sup> century and beginning of

the 19<sup>th</sup> century that Americans started having faith in courts, and the court started redefining its own image and evolving as an institution. These are institutions that evolve.

Today, if you see this huge cleavage between the popularity (I hate to use that word for the Supreme Court) of the Supreme Court and the popularity of the elected government, it is because the two institutions have evolved in opposite directions. And that is a reality the government and the political system have to correct. We evolved in two different directions because post-1976, judicial activism has been – and what I say is again the second defining moment of the Supreme Court – the Krishna Iyerization of Indian jurisprudence. As Prof. Bakshi always said about him, it was the Supreme Court of India, Justice Krishna Iyer made it the Supreme Court for Indians.

Did they do anything different? No. What they did is they took on different kinds of cases and applied the same legal principles, and came to a result which changed their image from being a landlord's/zamindar's/tax-dodger's court to being the average Indian's court. That's the difference. What did they do in the 60s and 70s? What did they say about bank nationalization? Bank nationalization was not a petition filed by a zamindar. It was not a petition signed by a feudal landlord. Bank nationalization was a monumental blunder as we admit today. A monumental blunder. And what did you do? You nationalized the company and did you pay middle-class shareholders who had invested in their bank for the value of the share? Property loss for zamindars is completely different. The idea of social reform, the idea of democracy, is to destroy feudalism. Banks, which were largely held public companies, were not feudal property. And whose property did you take away? Some dishonest promoters had already siphoned away enough money and nobody touched them. Their Mercedes Benzes were in place. It's the middle-class shareholders who lost everything.

So what did the Supreme Court say? It said if you take away their property, you must pay them something which has a semblance of

compensation. What is the privy purses case? The Supreme Court never said you cannot abolish privy purses. A power is given to the President to recognize who is a prince, only for the purpose of identifying who gets the privy purse. Using that power, the executive government which advises the President – the President is only a name – advised the President to derecognize every ruler. That's not what that power is meant for. What did the Supreme Court say? That the Constitution grants them privy purses; if you want to do away with it then amend the Constitution.

Why did the court say this? It was not standing up for the princes, it was standing up against the abuse of power. And abuse of power is a canker which grows on society. These are the insidious encroachments. If you allow them into your body, if you allow them into your legal system, rule of law is a casualty. What the Supreme Court said in the Keshavananda Bharati case at that time raised everybody's eyebrows. It was a very closely divided judgment, 7-6. It takes great effort to discern the ratio of that judgment. The ratio of that case has actually come out as how the later judgments have interpreted that. But I don't think that anybody in their right mind today has told the Supreme Court to reconsider this position. I don't think anybody in 2007 will say that the Supreme Court should not have said that Parliament has to be restrained. There has to be a lakshman rekha somewhere. So, institutions evolve.

The real cause for debate in India is not whether the court has the power. Let's identify now what judicial activism is actually what about. Research published in the *California Law Review* said that during the 1990s when this expression gained common currency, the expressions 'judicial activism' and 'judicial activists' occurred in an astounding 3,815 journals and law review articles. In the first four years of the 21<sup>st</sup> century, the term has surfaced in 1,187 articles, an average of more than 450 a year. Why? Because judges today are far more likely to accuse their colleagues of judicial activism than they did in prior decades. And the term has assumed a prominent role

in public debates, appearing regularly in editorial pages, web blogs, political discussions, confirmation battles. Somewhat fittingly, the first use of the term, ‘judicial activism’, to attract substantial attention occurred in an article in the popular *Fortune* magazine written by a non-lawyer. And let’s be very clear, it is a pejorative expression. You never praise a judge when you call him a judicial activist. What you mean to say is you are using your power to expand that power. You are using your power irresponsibly. So let us deal head-on with judicial activism.

We start with the premise that in the Indian Constitution, judicial review is expressly recognized; it confers the Supreme Court and High Courts with the power to issue writs to contain executive government. What has changed today is what the judges are willing to take on their platter. Not the legal principles they apply. I am not talking about each and every case. There are bound to be aberrations. Let us take an abstract proposition. Parliament and the Executive are well defined. But in their functioning today occurs a vacuum primarily on account of laxity of accountability. Accountability of the executive is the fundamental feature of the rule of law. If judges are the guardians of the rule of law, it is a part of the doctrine of equality. The vibrant doctrine of equality. If that is what the court is meant for, then I argue what is wrong with the court filling this vacuum and enforcing accountability.

Let’s be very clear, this debate of judicial activism is not a debate about a shift towards liberalism and a shift towards conservatism. Let me give you an example. In the US, the Warren Burger court struck down segregation of schools and ordered desegregation. It said separate but equal is not a doctrine of equality. You cannot have separate schools for black and separate for white children. They were called the activists’ court. In 2007, everybody said John Glover Roberts’s court, the current court – especially after the Reagan and Bush appointments – had become a conservative court. It struck down the use of race as a balancing factor in a very carefully administered programme of

admission to colleges. They said no, the moment you look at race, it is *per se* bad. They are accused of being activists because they've cast aside past precedents and interfered. You have had on the one side a liberal court which is called activist. You have on the other side an extremely conservative court that says environmental law is not our problem, that is for the executive, and which has turned away almost every *pro bono* dispute. They come and strike down a law like this, they are activists. So this divide is not political. This divide is not an ideology. This divide is on what you perceive the role of the court to be.

It's the same problem in the UK. Its parliament, under European pressure after joining the European Community, enacted the Human Rights Act. When Parasaran Sir and I were in England, Lord Harry Woolf was the chief justice. He told us that the prince (Charles) had called him and said, "You people now have to start dealing with human rights. How are you going to manage?" And his answer was, "You just have to read the judgments of the Supreme Court of India and how wonderfully they have developed the human rights jurisprudence. We may not do as well, but we will catch up somewhere." This is the international perception of our court.

Last year, there was a brazenly discriminatory law passed, a law of preventive detention without any reason, one of these post 9/11 laws. Copying America they made a law in England. However, that was challenged saying if you need this kind of law for security, why must it apply only to non-citizens. It should apply to everybody. And the House of Lords said yes, that's a valid argument. If you have a security issue and the man is a threat to security, how does it matter whether he is here on a work permit or whether he is here on a British passport. They said this is singling out foreigners for adverse treatment and struck it down.

Now you say the House of Lords has turned activist. Parliament makes human rights acts, the House of Lords enforces it and they are called activists. Where does this mistaken perception come from? Why has

this happened? And has this happened for the first time? Certainly not. Lord Coke started by saying that reason of natural law is the ultimate source of law. At that time everybody considered this almost blasphemy. So they said who are you to say this goes above church and king. But he said no, reason is more important. Lord Mansfield developed the doctrine of public policy. He would invalidate contracts, he would invalidate transaction on public policy... And finally that laid the foundation of judicial review of executive action opposed to public policy. A very nebulous expression, public policy, but the courts have ascertained it.

Why has this happened? Because, for institutions to remain relevant, to remain contemporary, they have at times to re-adjust, exercise self-restraint, and this exactly what our judges have done. The new parameters of judicial review have not relaxed the standards of substantive law. In principle, what we still do is what we did 50 years back. Yes, certainly, the principles have been sharpened; We do not question the product, we question the process. The decision-making process has been transparent, it must be worthy of a constitutional government. If the process is transparent, if the process is not tainted by corruption and/or bad motives, then the product, wise or foolish is for the executive government to decide. We have evolved the doctrine of arbitrariness. People said this arbitrariness is an unruly horse. It is as unruly a horse as public policy. And what did our founding fathers, the framers of our Constitution do, when they framed the seven freedoms in Article 19 and the exceptions were a law which is in public interest, reasonable in public interest; and who decides what is reasonable in public interest? The Supreme Court decides whether finally it is reasonable in the public interest.

So when our Constitution expressly asks our judges to decide what's in the public interest, what is public policy, what is reasonable, how then can you charge our court of being an activist court? If the court says I will test certain actions on the grounds of arbitrariness, it is as nebulous or as crystallized as in the public interest. The rights of the

poor, bonded labour, the weaker sections of society whom nobody cares for, who are too poor for the executive to care about, it's concern for them that came into the courts and the courts started using their writ to make sure their human rights were respected. Nobody blamed the court for doing that because it had no political repercussions.

The second major area of development has been environmental law. There were some concerns about what the courts were doing but by and large everybody was happy because what the courts were saying is Parliament has made laws. Mrs Gandhi was a great champion of the environment In 1972 when we attended the Stockholm convention, we put the laws in place. And like a lot of other laws, those laws were only in the book of statute. There wasn't a single prosecution that was successfully pushed through under the anti-pollution laws till the Supreme Court said if you have a law that prevents pollution, you have to enforce it and if you are not going to enforce it, we will do it. Do they have the power to do it? Of course. What are they doing? The writ of mandamus is meant to enforce the law and the Supreme Court issued writs of mandamus asking the executive to enforce the law. What they changed was the procedure. They cut short judicial delays.

As an American author has described very sarcastically but very nicely, to the lay citizen, the victim of the legal system as he calls it, the law looks from a distance like a very ascertaining process in which the two lawyers from the other side are graceful dancers dancing to some unheard invisible tune, slowly, gracefully, and over the years the case is gone. And he is saying this about the American system. Multiply it 25 times when it comes to India. What did the Supreme Court do? They cut short the process. Initial arguments in the court were, yes, you can ask me to shut down but ask them to file a suit in which I will have a right to lead evidence and in which I will have a right to cross-examine the witnesses till either the judge dies, the witness dies or the lawyer dies and then I will be prosecuted. The court said no, nothing doing. We are going to treat you summarily, changing the procedure to meet the situation. I don't know how successful the measures have been in the south, but I can tell you Delhi has a lot cleaner air, thanks to CNG.

What did the Supreme Court do in the CNG case when there was such a rumpus? It first called the Government and said, are you convinced that Section 3 (1) of the Environment Protection Act is a power coupled with a duty? A duty to protect the environment? Because it is a part of the Directive Principles. They said, yes. Then the court said, have you failed in discharging the duties? They said, yes, a white paper says Delhi air is unbreathable. The court says can you ask people to stop breathing? You can't. So your only option is clean up the air. So what do you do? The law says where this has to be done, you appoint a committee of experts. So they appointed a committee of experts headed by Mr Bhure Lal. The committee gave a report saying Delhi should switch to CNG as fuel. They asked the Government if it had any objections. They said excellent, no, we need two years to implement this. That was in 1998.

In January 2000, Mr Bhure Lal sent a report to court saying I must tell you, not a single bus has been purchased. When this report became public, the minister said yes, yes, we will ask the court for three more years. The matter came up. I remember the Chief Justice was presiding and I was the Solicitor-General but continuing as *amicus curae*. I said this report has come and it is obvious that everybody wants you to extend the time limit. This was January, the penny dropped in March. Justice A.S. Anand only remarked in court that if anybody had any such impression then then they were harbouring the wrong impression. Justice B.N. Kripal who was sitting with him added it was very nice, people would use bicycles instead of buses, it'd be good for their health and the air. This was like a cat set amongst the pigeons. The politicians went into overdrive, applied for extension of time, and they said no. I remember, the matter heated up to such an extent that (and I make this public) the Chief Minister of Delhi wrote to the Prime Minister saying I should be removed from the office of Solicitor-General because I was going against the Central Government. And when the Supreme Court forced them to have CNG, and the air of Delhi cleaned up, what happened? In 2002, the Chief Minister of Delhi went to the US and received an award for

cleaning up the air in Delhi. The judges didn't go and they don't want to go.

The third thing the court has been enforcing and which today has caused maximum irritation is enforcing transparency. The court is enforcing transparency whether it be in the award of tenders, grant of permissions, licences, real estate development. The court has started reviewing governmental action whereas earlier the court would have said no. In 1977, the Supreme Court said award of tender is not our business. Today the award of virtually every tender is questioned in court. Yes, it causes loss to the public, yes it causes setbacks, but in today's society, because judges are one of us, will a judge sitting there reading an affidavit of the government believe it to be true, when the facts indicate otherwise, when time after time you find that tenders are awarded not to the lowest but to the second lowest? For reasons that do not bear scrutiny? Yes, out of 100, and I say this is the strength of judicial review, out of 100 cases that come into court, in one or two cases they are struck down, in the rest they are upheld. But the process has instilled discipline in governments.

Having worked three years in government I know that today the ministers are concerned, saying "We have to be careful. If the matter goes to court tomorrow I don't want to be hauled up." So it's these checks and balances that that have come into place. So far it was so good. But now when the court has started saying, let's examine the recent areas of friction, we must have transparency in those who occupy high office, our Supreme Court is accused of being activist because it has directed that people who contest for high office must disclose their assets. Where did they get this from?

There is a reason the court has done that. They said the right to free speech nowadays is recognized, not merely the right to speak, but it's a larger right. A right of communication. For the right to communicate it must be informed speech, and for speech to be informed, every citizen of this country has a right to know what is going on. Is that so shocking in a democracy if the constitutional court says every citizen

in this country has a right to know the antecedents of the person who is asking them to vote? Because giving a vote is a manner of expression. When I say I vote for you, I am speaking in your favour. I am supporting you. Speech is not merely oral or written. And when the court says, very well, then, for there to be informed speech, disclose your assets, how does that become judicial activism?

And let me tell you certain environmental decisions are coming in for criticism. You may have read about the controversy regarding the ongoing forest case. It has been going on since 1996 and suddenly the government has discovered that the court has become an activist. Why? Is it because in 1998, when the trouble first started, the court was only finding out why the Forest Act and the Forest Policy, framed not by the court but by the government, was not being implemented in the North-East? They were told that there is a special custom in the North-East which prevails over the Forest Act by which every tribal individual is entitled to cut one tree.

Mr T.V. Rajeshwar, the Governor of Uttar Pradesh, (a very senior civil servant) was asked by the court and said when he was Lieutenant-Governor of Arunachal Pradesh the region was a thick forest. Now it looked like a golf course, clean-shaven, trees removed. He reported that this one permit was a terrific system of finishing a forest because all that is required is that when a tree is to be cut, a permit has to be produced. There is no way of checking whether that individual used the permit for one tree a year or to cut 365 trees. And then when the court issued notices, one of the judges got suspicious. He said, please let us have the names of all the owners and the government said no, no these were all tribals. Yes, each of those saw mills belonged to a partnership firm in which there were three tribals. But there was also a fourth partner from Calcutta. And then secret reports were given by Mr Rajeshwar pointing out the involvement of the local chief minister and the ministers. And what was their reaction? The attorney-general, Mr Ashok Desai when he moved the application, said I want to assess this in the chambers. When we went in he said they were threatening

to secede. Why? Because the court had ordered the seizure of ₹ 2,000 crore of wood. So what started as environmental law, cleaning up the air and preserving the forest, actually ended as cleaning up something else.

Why has the court been criticized for being activist? Because the court has said, interpreting the Forest Act, interpreting the rules made (not by the court, but by the government), that you must have independent people on the forest advisory committee. Is it shocking to say that if you have a forest advisory committee who is going to advise you on grant of permissions, it should not be an in-house committee? The law does not require a provision for an in-house committee, you can appoint them anyway. When the law directs that a committee be set up, it means it a committee comprising people who know and who are outside the system. There should be three 'outsiders'. And the government said the Supreme Court has turned activist because it insisted on three outsiders being on the committee. For unauthorized colonies in Delhi, the court has turned activist. The Supreme Court said your master plan is this and the city cannot be developed like this. Residents' welfare associations are before us saying there are peaceful neighbourhoods, residential neighbourhoods and they have all turned into factory zones. Please stop this or change your master plan. This is a breeding ground for corruption.

Your law does not permit, you permit. How you permit, we all know living in Indian cities. The criticism was, what is this? Is the Supreme Court meant for enforcing the law street by street? My answer is, if the Supreme Court of India has to enforce the law street by street, it's a sorry comment on the state of governance. This is what judicial activism today is all about.

There was a lot of criticism about the recent nine-bench judgment in the Coehlo case where the Supreme Court again said you can't use the Ninth Schedule every now and then. What has the court said? The court has said, majorities in Parliament are transient. The reason why constitutional courts are created is there are certain timeless

values, individual rights, which need to be balanced against group rights which may for the moment appear to be very attractive and have other political compulsions. The court has only said, we will judicially review whether you have gone over the top, and putting it in the Ninth Schedule is not going to save you. Is that so ridiculous? What the government is virtually claiming is that any law passed by Parliament with a two-third majority is beyond judicial review. Then you might as well knock off half the Constitution because all popular issues are carried without debate in Parliament.

Dr Rajiv Dhawan has come out with a book on debates on the reservation issue. It is a very controversial issue but one thing is clear, it has always been a passionate issue. It has been a passionate issue in the Constituent Assembly, it has been a passionate issue every time it has come up in Parliament. And it continues to be a passionate issue. It was always debated, carefully considered and when the Supreme Court ruled that no reservation in promotions be granted, the ruling was overturned by a constitutional amendment. When the matter went to the Rajya Sabha, one person wanted to speak. It was the last day in the house and the members wanted to pass the law quickly so the Speaker told him that your greatest tribute will be that you do not speak, please sit down. And the law was passed amending the Constitution.

In a situation like this, when something is so driven by the passion of the moment, some of us have a more dim view. According to us it is driven by politics, but let's assume it is driven by the passion of the moment. Should there not be some constitutional institutions that stay away from politics, that are going to see if the balance is maintained or if the Constitution has been breached? This is what judicial activism in India is about. Is it free of blemishes and faults? Certainly not. There are problems. Mr Arun Shourie in his critique, and I have great respect for him, that is why let me deal with the negative point he brings up. The first point he brings out is, borrowing from Robert Bork's saying, "the judiciary is a ship with a great deal of sail and a very shallow keel". The criticism is that you judges don't

understand anything. Everything you decide in these areas is based on public policy, sociology, complex social science, whereas you judges, all you know is law and law by itself is an empty vessel. So who are you to decide?

I do not agree. Ultimately, the judges who are appointed will be equipped to deal with any subject. And if they are not equipped to deal with any subject, they are not fit for the Supreme Court. There is a very interesting incident I would like to share with you. Two years ago I was invited to a dinner with some law lords and one of the lawyers present there said it was unusual for them to adjourn the case. One of the law lords said they were hearing on a case on copyright of DNA and after hearing a day of arguments realized they did not understand the subject sufficiently. So they had adjourned the case, taken two weeks' break during which time a professor from Cambridge University would teach them and once they understood the case, they would go and decide the case. Therefore it is a hollow argument to say judges are taking on things they know nothing about. Surely a judge is also a part of the citizenry and every citizen is entitled to understand the dynamics of the social processes that go on in the country.

The second criticism, a genuine one and one that is a genuine concern of all the parties is that over-intervention by the courts raises hopes and will ultimately get you to a situation where the court will not be able to deliver. Yes, this is a very genuine concern and there have been situations where the court has had to back off. Let me give you an example of what happened in the Delhi transport case. There was an accident in Delhi and Justice J.S. Verma took the matter on board as part of the air pollution case and said traffic is also responsible for pollution. He called the traffic police, a host of directions were issued to try and make the streets of Delhi safer and he said, hopefully this will be the role model for other States. It was realized that the court could not enforce it, and the matter has died out. Yes. But taking a cue from what the Supreme Court held, the Delhi High Court has started taking steps in a public interest litigation, issuing directions.

It is a genuine concern that when the court steps in too often, it builds up hopes that it may not be able to deliver on. But then there is only one response I have for that. It only shows that the area which is left uncovered by effective governance is too large. If the court is stretching itself too much, I can understand the criticism that the court has gone into an area it should not have entered. Such aberrations do occur. But if the court has stepped into areas where it can but is over-promising, why has that situation arisen? That is the real question we need to address. It is true that the court runs a very serious risk, because it has neither the sword nor the purse, and if popular will turns against the Supreme Court, the institution is destroyed. The Krishna Iyerization of jurisprudence has brought the institution back into relevance as a constitutional court. When we judge judicial activism in India, please judge it by today's Indian standards. What is legitimate intervention today may become excessive intervention tomorrow. Nothing is cast in stone. But if there is a justified feeling that the court is overstretched, then I think that is a matter of governance that needs to be addressed.

The third point is that if the judges are setting such high standards, then they must be judged by it. That is a very correct criticism. A judicial activist judge is like Caesar's wife. He has to be above suspicion. But then that is not a problem with judicial activism. That is a problem with the flawed judicial appointment process. Unfortunately, those who govern us have not, over the years, been able to put their politics aside and arrive at a consensus on how and what should be done. Every time you are in government, you want to reduce the role of the members of the Opposition; every time you are in the Opposition, you want to increase the role of the people of the Opposition. You want more role for the judges. If you are in the government, you want less role for the judges and it is this battle that goes on. In this nation we cannot even say look, this is too vital an institution, let us put politics aside and decide on what should be the model of the judicial commission. For the last five years we have been struggling, we have not had a consensus. So if there is a problem, it is not of judicial

activism. It is a problem of how the judges are appointed and how the institution functions. Yes, there is a need to check and safeguard the judges, but not at the risk of compromising judicial independence.

Recently, there was a proposal to have a committee of MPs watch the conduct of judges. Somebody asked me what I thought and I said, look, why don't you just wind up the court. A part of the problem is also created by the Executive and that is peculiar to India. Where it suits you, you hide behind the courts. Babri Masjid is a classic example. The then Attorney-General told the bench that the armed forces are ready, waiting for My Lordship's directions. What business does the government have to complain about judicial activism? That is one area where the judges have never trod whether who is to command the army or who is to be talking or whether the paramilitary force is to be used or what degree of force is to be used. But the Government did not want to take the decision for fear of offending one or the other group.

What do we want? What we have developed over the last three decades? A vibrant, constitutional organization that enforces transparency? I don't think that's a question that even calls for an answer. I don't think any right-thinking Indian will dispute what he wants. Is it free from troubles? No. But I will only quote Mr Parasaran's predecessor, one of the finest lawyers the country has seen – Lal Babu (L.N. Sinha). It was the Minerva Mills case. Mr Palkhivala lambasted the government and his rhetoric was amazing, it mesmerized the court. And he spoke about how Mr Gokhale insulted the judges as such. Lal Babu got up to reply, and I have never forgotten his opening words. In his soft, gentle voice, he said, "I have only two things to say. First of all, let us remember that it is true that this court is the guardian of Fundamental Rights and without this court, Fundamental Rights will not remain. But let us also remember that without Parliament this court will not remain." The second thing he said was that a foolish judgment is not a ground to wind up the Supreme Court, just like a wrong law is not a ground to wind up Parliament.

Aberrations are not what make an institution. Aberrations are to be recognized, cast aside and moved past. He said they were in the dust and din of politics, and used language that would never have been used. Let us not be guilty of the same offence. And I must say, 70 per cent of Mr Palkhivala's rhetoric was neutralized. But his words were the words of a very wise man. Aberrations are not what define an institution as long as you determine that they are aberrations. If they become the rule, then the institution is the poison. But if you identify them as aberrations, the institution stands in splendour and the splendour is only increased by its power to correct itself as it goes by. It is this power of correcting and this power of evolving that has brought our court to the heights it has reached. The height of this court can only be measured by one simple thought. Can any of us sitting here imagine India without the Supreme Court? Ask yourself this question, and if the answer is a resounding "No!" you know where it lies in this debate in the ultimate analysis. Because in the end, if democracy dies in our hearts, no court/institution can save it and at the end, since I am speaking on this occasion, in memory of my late guru, let me quote a very beautiful sentence he used once. "In the end we must always remember that democracy is a seamless endeavour, not a safe harbour." These debates will continue but our judges must continue to do their good work.

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# **Good Governance and the Role of the Lokayukta**

**Justice Santosh Hegde**

September 4, 2010

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It was my good fortune that I knew Mr Palkhivala somewhat intimately for various personal reasons and not for professional reasons. I did have his guidance as a young lawyer when I casually discussed a State excise matter with him. Thereafter I had many opportunities to meet him. I had the privilege of accompanying him from Bombay to Mangalore when my father passed away in 1990. He delivered the condolence address. Thereafter also he continued his relationship with my family. He and his wife were very kind to my mother, and any time they had the opportunity of coming to Mangalore, they made it a point to tell us that they would visit us.

I have very keenly followed his legal career. I have specially gone to Delhi to hear his arguments in some special cases and all of you know about the cases he argued. He was a great orator, another fact known to everybody. I pay my homage to him today by delivering this lecture on Good Governance and the Role of the Lokayukta.

The creation of a post like the ombudsman was recommended in India in the year 1966 by the first Administrative Reforms Commission

(ARC) represented by the late Moraji Desai. It recommended that the time had come to have an organization, an independent one, which would supervise the administration in the country. That means at that point of time it was felt that there was maladministration. Therefore, there must be somebody who could supervise it. That body was not meant to displace a constitutional body but to show them the right path to proceed and help victims of maladministration. But from 1966 to 1984, no State passed any law creating the post of a lokayukta, which is a State post. The ARC also recommended that there should be a lokpal at the Centre. Unfortunately, that post has not been created. For that matter, the bill has not even been taken up for consideration although it has been placed before Parliament many times. And, as is the case with Parliament very many times, there was no time to discuss the bill. It appears that only one issue was raised: Should the Prime Minister be included in the jurisdiction of the lokpal? Three successive Prime Ministers have said they have no objection to this. This did not satisfy Delhi, therefore, Delhi remains without a lokpal.

When Ramakrishna Hegde became Chief Minister of Karnataka, he came to power on a slogan of value-based politics. He picked up the forgotten suggestion of the first ARC and moved a bill in the assembly which was passed in 1984. Vested interests prevented its implementation for two years. In 1986, for the first time, the Lokayukta was appointed. Justice A.D. Kaushal from the Supreme Court was the first Lokayukta of Karnataka. He was from Punjab.

The Karnataka Lokayukta Act was very comprehensive at that point of time. It considered many activities of the lokayukta institution and gave it the necessary infrastructure. One thing peculiar about the Karnataka lokayukta is that it came into existence after seeing the performance of the Anti-Corruption Bureau. Many States, including Karnataka, had an Anti-Corruption Bureau. However, it was found that the bureau, which was managed by the police officers themselves, was not very effective. Therefore, another body called the Vigilance

Commission was appointed with a retired High Court judge as head on the assumption that the presence of a High Court judge would bring some change. But in Karnataka, that was also found to be lacking. Therefore, the Lokayukta Act combined the powers of the Anti-Corruption Bureau as well as the administrative bureau. By a judgment of the Supreme Court in the case of *Rangaswamiah vs the State of Mysore*, Justice Jagannath Rao held that though the Anti-Corruption Bureau comes under the Lokayukta of Karnataka, and since it does not have the police powers contemplated under Section 36 of the Criminal Procedure Code, and Section 17 of the Prevention of Corruption Act (PCA) requires a police officer not below the rank of the deputy superintendent of police to investigate, the lokayukta does not have the power to investigate any corruption case that falls under the purview of the PC Act. But the judgment still held that for all administrative and disciplinary actions, Lokayukta is the head of the Lokayukta Police. The lokayukta police play a dual role: when they act under the Prevention of Corruption Act, they are policemen and when they act under the Lokayukta Act, they are the lokayukta police. In view of the fact that the Lokayukta was held as the chief of the police wing, it had disciplinary powers over the police wing and so the judgment to keep out the lokayukta from the Anti-Corruption Bureau did not have much effect. Today in Karnataka, the lokayukta police have done wonderful work. If you take the statistics, from 1986 onwards till about 2001, put together, there were hardly 100 cases of detection of corruption and hardly 50 cases of enquiry of maladministration in the State. From 2001 to 2005 the face of the lokayukta in Karnataka was changed.

The then Lokayukta, Justice N. Venkatachala, took rigorous and active steps and the police did quite a bit of good work. But there is a difference in the work style of my predecessor and myself which was not accepted by the people of Karnataka when I first came. That was when I was asked by the media as to whether I would continue the good work done by my predecessor. I told the media that so far as the goal is concerned, yes, but so far as the pathway is concerned, I

am taking a different path. I do not think what was done earlier was justifiable because the lokayukta cannot personally conduct raids and set traps. Therefore, I will supervise the work of my officers and I will show you the result.

It was not taken to very kindly. As a matter of fact, one of the vernacular newspapers took an SMS poll and 96 per cent of the readers said, “Either you work in the same manner as your predecessor or you quit. You have not been asked to come from Delhi to sit in an air-conditioned room.” Of course, I did not react to that but I am very happy to say that the next year, the readers of that very same newspaper voted me as the “man of Karnataka.” I did mention that the first change I am going to bring about in the institution of the lokayukta is to choose officers who are acceptable to me. I wrote to the government and told them that you have fixed the cadre in the police as well as in the administration side. I want you to send me three names and I will make some enquires about them and thereafter we will choose one of them. Normally what they do is that they only send those whom they don’t want and we then write back asking for three more names. In the beginning there was opposition from the bureaucrats; the politicians did not understand the consequences of that. They said we cannot give you A,B,C and we can only give you those whom we can release from our service. I insisted and within 3-4 months things settled down. After four years in that institution I am very happy with the members serving the lokayukta.

In the last four years the lokayukta police have trapped at least 1,400 people of whom at least 60 per cent are senior officers – IAS, IPS and others. When I came there were over 100 corruption cases pending. Because the competent authority did not give the sanction necessary under Section 19 of the PCA, they could not be charge-sheeted. Just then the Supreme Court in four cases – including those of K. Karunakaran and Lalu Yadav – declared that unlike Section 195 of the Criminal Procedure Code where protection is given to a public servant who commits an offence in the discharge of his official duty,

Section 19 is different. So far as the public servant is concerned, he can under the PCA commit only two offences: one is receiving the bribe and the other is amassing wealth beyond known sources of income.

Since neither of these two acts has a nexus with the discharge of official duties we use the phrase “Sanction is automatic”. If sanction is automatic as stated by the Supreme Court, which is the law of the land under Article 141 of the Constitution, then it has been deemed to have been granted. So we have filed charge-sheets accordingly; those matters are now pending in court. Thereafter with some cooperation from the government, we are getting sanctions that may take about a year sometimes as investigation takes its own time, plus one or two years waiting for sanction. This is the major hurdle.

I think the sanctioning authority must be the lokayukta himself because the qualifications for being a lokayukta are that you have to be a retired judge of the Supreme Court or a retired chief justice of a High Court. You have to trust him at some point of time. When the sanction orders are passed and sanction is refused, it is like stepping into the arena of a judicial review for which no one has the authority under the Constitution; only a designated authority which is a court of law can do this. The appeal to the government has not been very successful.

Be that as it may, in Karnataka, today, I get the impression that corruption has increased not decreased. But there is a change in the system. We have identified many departments, rounding up touts and holding them as abettors and charge-sheeting them as sanction is not necessary. So, in that atmosphere, the (bribe)-receiving officer will have to adopt different methods. Now very many methods are available to them; we are also trying to go ahead with our own thing. Two things that are necessary to prove this offence are that there must be incontrovertible evidence to show that there was a demand made. Now that is very difficult. The next part is that there must be evidence to show that he received the money. That was easy because we used to have phenolphthalene powder smeared on the notes. If he touches the

notes and washes his hands, they will turn pink and that is the reason people say, “caught red-handed.” But nowadays what they do is they say “You keep the money there or put it in a paper and keep it there or come to my residence and give it there or give it to somebody else”.

Fortunately, modern techniques have also changed. We have also made equipments which are very helpful in audio- or video-recording the conversation. But every time we go one step forward, they go two steps ahead of us. In spite of that we have been able to catch them, maybe because of the over-confidence of the officers concerned or by virtue of the improvement of the investigating system. That is how I can say that 1,400 officers have been caught by us. This is only 10 per cent of the work of the Karnataka Lokayukta. But everywhere in Karnataka, the lokayukta is known as an institution fighting corruption.

But what gives us more satisfaction than catching corrupt people is supervising or overseeing good governance. The Karnataka Lokayukta’s objective as enumerated in the Act itself is to oversee good governance including prevention of corruption, nepotism and arbitrariness in administration. Its jurisdiction covers class 1 officers right up to the chief minister, including politicians holding offices of profit like ministries or as chairpersons of organisations. The upa lokayukta, who is a retired judge of the High Court is required to oversee maladministration. He does not come into the picture of corruption from officers from below class 1 to the last cadre. We have a tremendous workload. There are at least 30-40 people a day visiting us with their problems vis-a-vis the administration. I have said in Karnataka that every government office should be like this. That is why I have implemented it in my office. You come and see how the institution functions. People who come to the lokayukta are not always literate or affluent. It is the common citizen who has a problem with the administration; it may not be due to corruption only but because of other factors.

I don’t know how it is in Tamil Nadu, but in Karnataka if you have to go the lowest officer, to get in there, the hands are stretched out.

They say “Sir is not there, sir is busy he can’t meet.” I’ll give you some examples to show how inhuman public servants can be. He may be a village accountant, he will say, “Not today, come some other day.” He will say after three or four visits that “Hey, this is not my job. The jurisdiction of your land comes under a different village accountant. Please go there.” We have changed the system. In every department, everybody has been told, “There are two-three chairs in front of you. The first thing I want you to do is to make them sit down and ask them to relax. Next, let them talk, don’t interrupt. Thereafter, try and find a way to solve the problem. Not say this is not something we can do. If I ever come to know that you have treated a complainant in this manner I will make sure that you do not continue in this office. You have to develop.” This, according to me, goes for every public servant and this is applicable to every citizen. Two things that are very important for a human being are humaneness and honesty. Unless the officer has honesty, I will not consider him as honourable. Being honest without humaneness is no good. So, this is how we treat the people who come to the office.

At the end of the conversation, if you find there is absolutely no way you can help the person, he has to go to the court of law or there is a statute that governs his problems, then we have no jurisdiction to deal with it. Very often we say, “Sorry madam, you have to go the court.” Believe it or not, 60 per cent of them when we say sorry we are unable to help, they fold their hands and tell us, “Sorry, it is our bad luck. You have understood my problem, somebody has heard my problem in its entirety, we are satisfied.” This is a basic thing we want followed in every government office. How far it is being followed in other offices I am not very sure, but the feedback we get is very good.

In 2008, a handicapped tailor and his wife put their eight-month-old child on the floor of my office and said, “Please look after this child. We are running away.” I said, “please sit down. Let us talk about it. Let us discuss.” Hesitantly they sat and they started explaining. This child had a problem and when it was born it had half-developed intestines.

This could have been treated very easily. This a known phenomenon I am told. A pediatric surgeon draws ₹ 33,000 salary teaching in a medical college; in 2008 he was drawing ₹ 80,000 a month after the Fifth Pay Commission. When the child was taken there, he demanded ₹ 50,000 bribe from the tailor. Knowing that he was poor, knowing that the child's entire future would be ruined, he didn't have the humanitarian consideration to treat it. The tailor brought the child to my office thinking that [the doctor] may cause some damage to the child. Now I could have sent him to major government hospitals. I did not say, "Go there, I will give a letter or telephone them or do that." I said, "Stay back." I sent my officers to various pediatric super-specialty hospitals and one of the hospitals, Manipal, agreed to do it for free. The child was there for one full month and we looked after the child and the parents. Thanks to the dedication of the officers, today the child is a perfect child. What would have been the fate of this child if everybody had thought, "Oh, my jurisdiction ends here. There is nothing more I can do about it. It is bad luck. You must have done something bad in your past life. That is why the child is like this."

This is just one out of hundreds of cases when we have reached out to the people, I am very proud to say. Lack of basic humanitarianism lies at the base of maladministration. Not that the power is not there, the jurisdiction is not there; it is there. We all should revolt against things like this. Another example I will give you is from the district headquarters. A pregnant lady went to the district hospital with labour pains. They didn't admit her saying she did not have the money. She walked across the footpath and delivered the child. In Karnataka there is a scheme. If a girl child is born in in a government hospital, she gets ₹ 100 a month for the next 7-8 years. Even that is lost. We took up the investigation suo motu. Ultimately, a nurse was punished. Doctors didn't get into any trouble. But these are things which bring happiness to us. And this is 90 per cent of our work.

We have problems in Bangalore city. Illegal constructions are going on. Where road frontage is only 20 feet, you find a 10-storey building coming up. In the BDA we have ward engineers and others. Everybody is looked after well. Nothing seems to ever go wrong. We have gone on a vigorous drive against these people. They say, “I have been served notice by the corporation to demolish my building.” They get an injunction. No application is filed to vacate the injunction. For years together, building construction goes on. They [the judges] say ‘status quo to be maintained’. What is the status? What is the quo? God alone knows.

I often tell my colleagues, ex-colleagues and others we should tell these subordinate courts what is status quo. You should have proof of what is prevailing on the day you pass the order. When a construction foundation is laid it means it remains like that only. But when the application vacating the status quo comes, there is a full-fledged building that comes with it. Then equities change. Poor people come and invest money, they had nothing to do with this, why should they suffer? And the Karnataka government has come with a tremendous idea to help these people. Who? The builders. It is regularizing the irregular buildings. I have come out openly and people have criticized me. So much so that today the Government of Karnataka says, “He keeps on saying, we do not know if he has that power.” If someone says I don’t know my powers, tell me. I will show you where it starts and where it ends. As a lokayukta, the power is of the citizen of Bangalore.

If today the lokayukta is known and I am invited here to speak, obviously you have found some difference between the lokayukta of Karnataka and the lokayukta of other States. You have to be proactive. I remember reading a chapter in the Constituent Assembly debates. The debates were very significant. When they first decided what type of political governance this country should have, many people stood up and said, “we have been ruled by foreigners for over 200 years. Let us have a government of ourselves. Let us rule ourselves.” And they decided that the political system will be a democratic republic. The

American president Abraham Lincoln defined it as a government by the people, for the people, and of the people. We get a great feeling while reading the Constitution “we the people of India have given to ourselves” – it is my government. It is my representative who is there. He will look after my interests. How they look after your interests, let me give you recent examples of the State assembly of Karnataka and Parliament.

When lokayukta became a controversy, the assembly met and had a great debate for four days. There were many items in the agenda, but only one issue was taken up. Should the mining irregularity be entrusted to the CBI or to the lokayukta? The opposition party said CBI and the ruling party said lokayukta. For the first time there was faith in the lokayukta knowing very well that he can't do it! But what happened for four days? The moment the assembly met, shirtsleeves were pulled up. “You come to Bellary and see what happens to your legs. You talk more about that, your tongue will be slit.” These are representatives of Karnataka. For four days they did not do anything. They slept in the assembly, they ate biryani and the next day they did the same thing. I am sure the sitting allowance was paid.

Now let's say go to the Centre. The government said pricing should be done first and there should be a vote for that. Other parties said there are other issues on the agenda, we should take them first. Arguments for what should be debated went on. Not one day was any other matter discussed. A former speaker of the Lok Sabha, Somnath Chatterjee said, “A day's proceedings in Parliament costs 1.3 crores of rupees. Every hour costs more than ₹ 23,000. If this is the case, it begs the question: Is this the purpose for which we elect them?” Mr Arvind Datar was showing me an article on the ombudsman and the British Parliament. It said, “This committee is not constituted for curtailing the rights of parliamentarians as they have the onerous job of arguing for the people of their constituency in regard to every action of the government.” Is that what is happening in this country? Aren't we making a mockery of democracy? In Karnataka it is said for a seat in

an assembly you have to spend more than 5-6 crores of rupees. For Parliament 10-12 crores of rupees.

Let us use our intelligence. Does it require that much money to serve the people? Do they require a rupee more salary than that of the senior bureaucrats? They get ₹ 80,000. Give us ₹ 80,000+1 rupee. There are people who say, “Fortunately they increased it to ₹ only 50,000.” But do you know they double the constituency allowance from 20,000 to 40,000 and secretarial allowance from 20,000 to 40,000. They are drawing a lakh and sixty thousand plus their daily allowance for shouting, adjournment which comes to 1-2 thousand. I think in a democracy we should develop the habit of asking questions. There is no reason to go on strikes or anything. More and more questions asked may bring about a change in the system.

My generation has ruined things in the last 64 years of independence. We are responsible for the situation today. The younger citizens may be able to change things. I have visited 172 educational institutions as of yesterday, just talking to the students about what is satisfaction. It is being satisfied with what you legitimately have. It doesn't mean as youngsters you should forget your ambition. No! You must have ambitions. You must try to become rich. There is nothing wrong in it provided you acquire it legitimately. Don't allow your ambition to become an obsession. That is when everything goes wrong. We require some more amendments to the Lokayukta Act. I have been fighting for that but till now I have not been successful. Only my designation has given me a chance for *suo motu* investigations against officers, but not politicians.

I am happy with the little things because there are former bureaucrats here who during their time had never seen maladministration of this type. This power given to the lokayukta to investigate officers suo motu without complaints against them is good because it is a double-edged weapon. No major corruption takes place without the connivance of political bosses and bureaucratic bosses. With the fear

of investigation hanging over them, I am sure at least one per cent of the bureaucrats will say, “Please don’t involve me in the file because it is not correct.”

It happened in my first enquiry into illegal mining. I found in one file that the director of mines had put up a note saying permission for transportation cannot be given to the owner of an iron ore mine but to a lease-holder appointed by the State and the Central Government, as mines and minerals are the property of the state. The principal secretary was in complete agreement to reject the application. The file then goes to the Hon’ble CM. He writes and says, “I have promised the applicant that permission will be given. Reconsider.” The two officers were transferred. The next two officers say the same thing. The CM says, “It is my election manifesto to help agriculturists irrespective of the law. So, it should be done. There shall be no further correspondence and permits shall be given for transportation.” In my report I said the reasonable value estimated is a loss of 23 crores of rupees. This should be recovered from the Hon’ble CM personally, and he should be prosecuted for the loss. We had a governor who was in transit. His Excellency wrote. “He claims that he has done it in public interest and you cannot attribute any motives to him. The law says you can’t do it. Public interest prevails when it comes to a particular person.” That was later followed by officers in 64 other cases. That’s the manner in which the system functions.

There was another interesting chapter in my report. It was about 28 politicians writing letters to various secretaries about a nationalized company: Mysore Minerals Limited. They wrote that “The bearer of this letter is a very good friend of mine. He wants 1-2 lakh metric tonnes of iron ore. Please give it to him.” Price is not mentioned. The records of the company show that it was sold at 25-30 per cent below the market price when the company acquired it and that is the only company in Karnataka which, during 2000-2008 when I submitted the report, was running at a loss while others who had zero in their

bank account had 25,000-30,000 crore. And this company is losing. Sometimes when they say let's nationalize it, what will be the fate of nationalization if this is the way things are?

In this context, I think the Karnataka Lokayukta has stood its ground against political pressure and has done something more than most other States which have this post.

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# Revisiting Centre-State Relations

**Nirmala Sitharaman**

September 17, 2011

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Shri Nanabhoy Palkhivala, eminent jurist and economist, was a champion of human rights. Princeton University called him a “defender of constitutional liberties”. From 1958, his annual ‘Budget Lectures’ set standards in educating people about public policymaking. In fact, it is worth recalling a comment, by now well appreciated by many: “There were two budget speeches, one by the Finance Minister and the other by Palkhivala.” A later addition to this was, “one was feared and the other was sought after”. I bow my head in respectful homage to this great scholar, jurist, economist and, above all, courageous human being.

In discussing the organizing principle of our Constitution, scholars question if India is a federation of States or a union of States with a federal spirit.

The earliest serious attempt to study Centre-State relations was by the First Administrative Reforms Commission (1966) with, first, Shri Moraji Desai and subsequently Shri K. Hanumanthaiah as its chairman. In the mid-seventies, it wound up after submitting

20 reports containing 537 recommendations. One of the reports addressed the issue of Centre-State relationship.

The Second Administrative Reforms Commission formed in 2005 had 13 different issues to be considered, including one on issues of federal polity. Shri Veerappa Moily was chairman of this commission which, between 2006 and 2009, submitted 15 reports.

The Commission on Centre-State Relations headed by Justice Ranjit Singh Sarkaria was appointed on March 24, 1983. Its report was tabled in the Rajya Sabha late 1988 and in the Lok Sabha early 1989. The report with 19 chapters had 247 recommendations.

In February 2000, a National Commission to Review the Working of the Constitution was appointed with 11 members. It gave its report in 2002 with 249 recommendations. It stated that 58 of them would involve amendments to the Constitution, 86 could be addressed by legislative measures and the rest required executive actions.

### **In Parliament Too**

Matters affecting Centre-State relations were discussed, at various times, in both houses of Parliament. In 1967, a Private Member's resolution was moved on Centre-State relations. Discussion pertaining to Centre v. Kerala Government took place in December 1968 under Lok Sabha Rule 193.

The seventies marked a watershed in Centre-State relations, with Emergency provisions being invoked under Article 352 quoting internal disturbances. Well after Emergency was lifted, in April-May 1978, the Rajya Sabha witnessed a Private Member's resolution regarding appointing a Parliamentary Committee to inquire into the legislative, administrative and financial relations between the Centre and States.

In February 1980, a Private Member's Resolution tabled in the Lok Sabha by Smt. Susheela Gopalan called for a reappraisal of the existing Centre-State relations with a view to giving more financial powers and greater autonomy to the States. A calling attention motion tabled

in the Rajya Sabha by Shri Bhupesh Gupta in November that year highlighted the observation of the West Bengal Chief Minister on the discriminatory policy of the Centre against his State. On March 24, 1983, came an announcement by the then Prime Minister regarding the setting up of a commission on Centre State relations – popularly known as the Sarkaria Commission.

Notwithstanding this, the Lok Sabha recorded discussions from end-March to mid-August 1983, on a resolution tabled by Shri Amal Datta. In July 1986, the Rajya Sabha witnessed a short duration discussion on the subject with the Ministers for External Affairs and Commerce participating in it. There were heated discussions in the Lok Sabha from March till August 1988, and in November 1988. Shri Buta Singh introduced a motion in the Lok Sabha in March 1989 on the Sarkaria Commission's report.

In November 1991, Dr Nagen Saikia of the Assam Gana Parishad moved a Private Member's Bill in the Rajya Sabha regarding setting up a commission to grant more autonomy to the States. In 2001, Shri Ramachandra Pillai tabled a resolution in the Rajya Sabha expressing concern over the increasing erosion of federal principles due to the Union Government usurping the power of State Governments.

Since 2010, we have seen several non-UPA States protest the discriminatory attitude of the Centre in dealing with them. The Bharatiya Janata Party's national executive meeting at Lucknow in June 2011 unanimously passed a resolution: 'UPA a grave threat to our federalism'.

### **Why Discuss Centre-State Relations?**

Why does Centre-State relations as an idea, engage us – the citizens – so much that it continues to dominate most debates on the political economy? Here are some reasons for this.

We are a large country with States differing in geo-topography and demography. The natural asset endowments are acutely different. In the States, generationally acquired predominant skill-sets vary widely.

For instance, Gujarat is known for commerce and trade, mobility, and largely self-motivated enterprise; people from Kerala [are mobile and adaptable, and the State is known for its] synergized human resource; in Bihar agriculture is the mainstay, there is high value for formal education, and mobility is directly proportional with education; whereas in Tamil Nadu there is a tendency towards urbanized thinking and livelihood, and the people are entrepreneurial and mobile.

Goa, Puducherry, Tamil Nadu, Sikkim, Arunachal Pradesh display well-rooted but different recently inherited institutional frameworks and socio-cultural influences, thanks to the influence of colonial masters. States strategically located along international borders, such as Gujarat, J&K, West Bengal, Manipur, Tripura and Assam, may or may not have issues to do with the border. Then there are landlocked States, such as Delhi, Haryana, Madhya Pradesh, Chhattisgarh and Jharkhand.

Issues arising from differing endowments and varying aspirations create situations where resource allocation and planning have to be sensitive and almost tailor-made. In the course of allocating resources or playing the arbiter, most often the Centre gets to be viewed as Big Brother! This brings us to ask if our founding fathers, while drafting the Constitution, visualized India as a federation with Big Brother at the Centre.

### **The Nature of Our Constitutional Structure**

Let us see how a few great minds described the nature of the constitutional structure.

\*“It is necessary to bear in mind the fundamental principle on which it rests. The basic principle of federalism is that the Legislative and Executive Authority is partitioned between the Centre and the States, not by any law to be made by the Centre but by the Constitution itself”. (Dr B.R. Ambedkar, 1949)

\*“A federation with a strong centralizing tendency.” (Ivor Jennings, 1955)

\*“The Constitutional edifice of India is neither unitary nor federal in the strict sense of the term.” (First Administrative Reforms Commission, ARC), June 1969

\*“However strong a centre the Constitution may have provided for, the polity is federal and not unitary in structure.” (Study team on Centre-State relations, 1967)

\*“The Indian Federation is said to be less federal and more unitary in character...” (*Union and State Relations*, T.N. Chaturvedi and Abhijit Datta, 1984)

The ‘strong Centre’ and ‘unitary character’ found full play for just short of two decades since the Constitution was adopted. We were ruled largely by a single party, both at the Centre and in the States.

### **More of States, Less of Centre**

In the fourth general elections held in 1967, the governments in five States (Kerala, Tamil Nadu, Orissa, West Bengal and Punjab) were formed by non-Congress parties. As an apparent development, these States started demanding more powers and resources. In several other States (Bihar, Haryana, Madhya Pradesh and Uttar Pradesh) defections caused political instability.

Friction in Centre-State relations arose due to: the office of the Governor; inter-State disputes; all-India services (dual control); financial relations and planning; and law and order.

The rise of regional parties is as much an outcome of the “centralizing tendency” as much as it is the cause for greater federalism. Even though one may differ with his point of view, Douglas V. Verney, author of *The Analysis of Political Systems*, makes the interesting observation that “.....Constitution was of necessity blue print; one that had to be put into practice over a vast subcontinent comprising of millions of people... Above all, it has to be resilient enough to absorb the pressures that have come from those who have wanted a more federative political system.” (*Indian Federalism in the New Millennium*, edited by B.D. Dua and M.P. Singh, Manohar, 2003)

Powerful voices described the malady of high centralization. In the bold words of Shri Nani Palkhivala, “The Centre has encroached too much upon the powers of the States so much that states are not able to start industries to produce even a shaving blade or toilet soap.” (*Constitution Defaced and Defiled*, Macmillan India, 1974)

Participating in the discussions in Parliament on Justice Sarkaria’s report, a member, Shri E. Ayyappu Reddy observed: “There is nothing which the State Governments are in a position to undertake individually. The duplicating of bureaucratic functioning has taken place at such a rapid pace that we have built up fortresses of bureaucratic indifference so that the ordinary citizen is totally helpless even to go in for a drinking water scheme in a remote village... has to be cleared by the Union government, the State government, the Zilla Panchayat, the Block and the Village (sic) Panchayat.” (March 1989)

Shri Ramachandran Pillai, during a debate in the Rajya Sabha in 2001, charged: “The increasing erosion of the federal principles in Centre-State Relations is due to the Union Government usurping powers of the State Government.”

### **Our Democracy**

Our democracy has been representative in nature, functioning essentially through its elected representatives in Parliament. Therefore, sometimes it is clubbed with other parliamentary federations such as Canada. Increasingly, we find that people, while not negating the representative parliamentary form of democracy, are desirous of participation in public policymaking. This was manifest in some recent developments. “...Article 253 empowers the Union Parliament to pass laws with respect to matters of State list in so far as it is necessary to implement any treaty, agreement or convention with a foreign country or any decisions made at an international conference.” (Union-State Relations: A Study, Lok Sabha Secretariat, New Delhi, April 1970)

In today’s India, we saw how West Bengal resented the way the Centre went about a proposed treaty with a neighbour on river water.

Apparently, the State felt that it wanted to be engaged with the Centre more comprehensively. We hear a clamour from some sections of society in Tamil Nadu for the Centre to revisit/review certain aspects of an international agreement with Sri Lanka. The Sarkaria Commission observed: “In order to reduce tension or friction between States and the Union and for expeditious decision-making on important issues involving States, the desirability of prior consultation by the Union Government with the Inter-State Council may be considered before signing any treaty vitally affecting the interests of the States regarding matters in the State List.”

### **Financial Relations**

Financial relations form a very important but difficult aspect of Centre-State relations. Commenting on the Australian experience in the context of persistent drift of financial powers towards the Centre, a scholar remarked, “It is by and through financial relations that federalism is disappearing.”

In India, the assistance given to States through discretionary loans and grants for Plan purposes has been much larger than that given through the medium of the Finance Commission. “... it would appear for the practical purposes the Planning Commission has become the principal agency for determining the financial needs of the States and for routing central assistance to the States... the Constitution makes no distinction between Plan and non-Plan expenditure and development grants and fiscal needs grant.” (*Union-State Relations: A Study*, Lok Sabha Secretariat, New Delhi, April 1970).

There is a need to strengthen the Finance Commission as it makes grants under Article 275 of the Constitution; commentators have felt that the Planning Commission is extra-constitutional and non-statutory. A group of Chief Ministers may be included in the Planning Commission so that it generates goodwill in the minds of State Governments. Equally, acts of political vendetta such as the appointment of a person with serious criminal charges merely to spite the States should be avoided.

In 2008 a panel of 15 State Governments, led by West Bengal, had asked the 13<sup>th</sup> Finance Commission to increase their share in the divisible pool of central taxes to 50 per cent from the existing 30.5 per cent. Calculations show that the States have received only 24 per cent of the total revenue in 2011 while their developmental spending is ₹ 5,12,000 crore, while the Centre's developmental expenditure was ₹ 3,03,000 crore only.

Again, it is noted: "The States' right to financial autonomy for planning annual estimates of expenditure, under Article 202 of the Constitution, is severely eroded. A classic example is when the Centre retained Compensatory Afforestation Fund management and Planning Authority (CAMPA) where the entire money belongs to the States" (BJP Resolution, Lucknow, 2011). One wonders if Centre-State relations have just become "bargaining federalism"? Morris Jones had probably only described inter-state relationship in these words. (*The Indian Union and the States*, A. Krishnaswami, Oxford, 1966)

In our attempt to understand Centre-State relations, we have had a sketchy look at Planning, Union-State relations and financial relations. The Seventh Schedule of our Constitution describes the distribution of legislative powers between the Centre and the States. The Union List has 97 items while 65 items are in the State List; 47 items come under the Concurrent List. The residual powers are with the Centre.

### **Constitutional Structure Not the Trouble-Maker**

The National Commission for the Review on the Working of the Constitution observes: "The problems that have attracted attention in the field of Union-State relations have less to do with the structure or the rationale of the Concurrent List than with the manner in which the Union has exercised its powers." It further goes on to add: "In particular, the Concurrent List, List III in the Seventh Schedule under article 246 (2), has to be regarded as a valuable instrument for consolidating and furthering the principle of cooperative and creative

federalism that has made a major contribution to nation building. The Commission is convinced that it is essential to institutionalize the process of consultation between the Union and the States on legislation under the Concurrent List.” (<http://lawmin.nic.in/ncrwc/finalreport/v1ch8.htm>)

State legislatures pass various Bills in their assemblies which suffer inordinate delay in awaiting the Governor’s or the President’s assent. During a debate in the Rajya Sabha in May 1978, Shri Bhupesh Gupta observed that there are “...articles which give the Governor the powers to reserve Bills for the President’s assent, or he need not give assent at all. Why should it be so? If the Bills are passed by a State legislature, certified by the Speaker of the concerned State legislature, they should be immediately the law of the land. If they are *ultra vires*, courts are there... The Central Government can go to court and challenge it. But the Bills should not be held up in the name of giving President’s assent”.

A classic example in this case is the status of The Gujarat Control of Organized Crime Bill 2003. After shuttling with minor amendments suggested and done, and after reconsidering and passing it again in the assembly in 2009, the Bill is awaiting presidential assent. It is important to note that GUJCOC 2003 is drafted on the lines of the Maharashtra Act (MOCOC), which has been operational for several years. Palkhivala had famously described the Constitution as a “social mandate with a moral dimension”.

### **Is Cooperative Federalism Possible?**

Justice Sarkaria made the following observation: “Federalism is more a functional arrangement for cooperative action, than a static institutional concept. Article 258 (power of the Union to confer powers, etc., on States in certain cases) provides a tool by the liberal use of which cooperative federalism can be substantially realized in the working of the system. A more generous use of this tool should be made than has hitherto been done, for progressive decentralization of powers to the government of the States.”

The first ARC felt that the basic constitutional fabric of the country was sound and must remain intact. “The Constitution is flexible enough to ensure its successful working, irrespective of whichever party may be in power, provided those who are in power mean to work it in the spirit in which the founding fathers have intended it to be worked.”

Let me conclude with the following words. In this talk, I have not tried to lay down every attempt of the Centre to undermine the States’ powers. We in the Bharatiya Janata Party recognize the aspirations of the people for a participatory democracy. By the very word ‘democracy’, we understand that it should be for, by and of the people. Being the flexible document that it is, the Constitution of India can meet the aspirations of the people. However, it can be achieved only when we can strengthen our existing institutions and respect the law. It is only appropriate that I end with the words of Shri Palkhivala: “The survival of our democracy and the unity and integrity of the nation depend upon the realization that constitutional morality is no less essential than constitutional legality. Dharma (righteousness, sense of public duty or virtue) lives in the hearts of public men; when it dies there, no Constitution, no law, no amendment, can save it.” (Privy Purse case, 1971, I SCC 85)

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# **The Art of Advocacy**

**Lord Peter Henry Goldsmith**

August 24, 2012

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I am absolutely delighted to be with you all today. I hadn't realized quite how important the Madras Bar Association and the Madras High Court were in the history of India. I am thoroughly delighted to be here on the 150<sup>th</sup> anniversary. I was delighted to hear the extraordinary history that you have just recounted on the Indian legal profession, the court, the Bar Association and what came through to me particularly were the historic firsts.

It was decided that the art of advocacy might be an appropriate subject. I approach it with a little trepidation because although I have a little experience, I'm very conscious that there are in this hall those with enormous experience in advocacy so I will be offering something of a personal approach. I hope it will be of some use particularly perhaps to the younger members here this evening. I want to say something I hope would be thought to be appropriate because of the joint sponsorship by the Palkhivala Foundation about arbitration which is in a sense, the newer side of advocacy for lawyers, and it's an area in which I have some particular experience. I may conclude with one or two words really just about the global nature of the legal profession.

Well, before looking at the future we need to go back because advocacy and the art of advocacy go back a long way. One can properly trace it particularly to the study of rhetoric in the Greek colony of Syracuse in the fifth century before the Common Era. That's where advocacy really started in a scientific way and it spread from there to Athens, the great city-state, where it became a highly tuned art of the ability to sway the assembly; theoretically the assembly was all of the male citizens. I have to underline the word 'male' because there wasn't that degree of enlightenment at that stage but still so far as democracy was concerned Athenian democracy was, of course, a trail-blazer, and all of the assembly listened to orations. The great men made speeches to them, they made speeches to juries, they were really the first professional advocates and it became the path to power. Actually if one looks around the world today one still finds many lawyers and advocates who found their path to power through the law. I served the Prime Minister Tony Blair though he tried often to forget he was himself a barrister.

From Greece advocacy spread to the Romans, to the greatest Roman orators. Mark Antony, who (in) Shakespeare at least had declaimed an extraordinary speech on the death of Caesar, and Cicero, one of the greatest advocates of all time. It was said that Cicero practised his advocacy on the seashore with pebbles in his mouth so as to make his voice clear and carry across the tumult of the waves. With modern microphones that is probably not a necessary technique to follow today. But Cicero wrote an extraordinary work called *De Oratore* which describes the science of rhetoric and advocacy. There were some who thought this went too far. For example, Plato the great philosopher, became disenchanted with democracy particularly because he was concerned it was advocacy, rhetoric and sophistry which had led to the conviction and execution of the great philosopher, Socrates. So there are two sides to this coin.

The modern world of advocacy is different, but nowhere is it more important than in the common law countries; in, of course, my

country, in India, in Australia, in the United States, and in many other countries where the oral tradition of courts and justice has continued. I have some experience of the civil system. In fact, I am actually a member of the Paris bar although I have never actually practised in a French court. I got through by some extraordinary sleight of hand. I know not a lot of French Law and indeed when I went to swear my allegiance in some way to being admitted to the French bar, I was asked by the young lawyers there which of the two colleges I had studied in and of course I had attended neither of them. But if you find yourself with a driving prosecution in a small town in France I might be able to help. I wouldn't put my skills in a French court any higher than that.

The styles of advocacy we have throughout the world have changed and I am going to focus on the advocacy that I know about. The United States has developed a much more flowery, they might say adequate, approach to advocacy substantially because they still spend far more time before juries than we do and that leads to one of my earlier points about tailoring your advocacy to your tribunal. They have a very different approach because they are most of the time even in civil cases addressing 12 non-legally qualified people about the issues. And that does lead to a different approach. There is a saying from the state of Kentucky that says, a motto for lawyers, "If the law is on your side, argue the law. If the facts are on your side, argue the facts and if neither are on your side just shout."

My own background: I will have been practising as a lawyer for 40 years next April. The first time I spoke as it were, used my advocacy skills in anger... I was going to say the first time I was paid for it. I am not actually sure I was paid for my first case but it's probably too late to ask for payment now. And over the years since then I've had the great fortune to be an advocate in many courts and in many causes. I've appeared many, many times in the British House of Lords and in courts in England and Wales and Northern Ireland, but never in Scotland. The Scots remain extremely proprietorial about their

courts. You have to be a Scots advocate to appear there so one day my ambition may be to appear in a Scottish court but they don't have an Englishman there. In courts overseas, the European Court of Justice is very different from the British courts.

The first time I appeared in the Court of Justice which is in Luxemburg was shortly after the United Kingdom had joined the European Community. We were being led by a very senior QC and found ourselves in a courtroom with a very significant number of judges with headphones on, listening to our speech and what surprised me was that they didn't say a word. I was used to a court that was very interventionist from the very first go. Finally after 35 minutes the president of the court opened his mouth. What extraordinarily insightful question was he going to ask? What he said was this: "Mr Dane (that was the name of the leading counsel) you said you'd be 30 minutes but you have been 35 already."

I've appeared in common law courts in many parts on the world which include Belize, St Kitts and Nevis, the Cayman Islands, the Bahamas, in Singapore, in Hong Kong and even in Bulgaria, which is not of course a common law court, which was an extraordinary experience. I am quite honored that they made me a member of Bulgarian bar to appear in this case. I'm a member of the bar of New South Wales as well. The Australians believe they're perhaps the only place that practices the proper common law. They think England has gone to the dogs since we joined the Europeans.

I've also had the experience of practising advocacy in the political sphere. I remain a member of the House of Lords in its political, its legislative capacity, since 1999. When I was attorney general I used to address the house frequently on legislative proposals and I still participate on matters where I have an interest.

So let me from what I have learnt, try and set forward some rules which for me are the rules which relate to the art of advocacy. I am going to save till the last, the three which I think are the most important. You

may disagree on the significance to be attached but to me they are the most important.

My first rule is that advocacy is about communication; it's not about showmanship. The great stories of showman advocates who practise their skills particularly before juries in a way which today should be regarded I think as showmanship. But for me the key is one is trying to communicate something; communicate to particularly the judge, perhaps the jury if the jury is there, and sometime to the public. Advocacy is about communication. I think I would like to say to the younger advocates the thing you have to keep in mind, it is about communication. If at the end the person you are speaking to doesn't actually understand what you've been saying then you have failed unless – and I don't recommend this but some people do – you are trying to win the case by confusing the judge. What you have to do, therefore, is to understand your case and communicate that to the tribunal. And there is no point demonstrating that in a showy way, there's no point demonstrating it in a way that is appearing superior, because you're actually trying to persuade.

The great advocate who went on to be Lord Chancellor, F.E. Smith, he went on to be Lord Birkenhead, was a tremendously successful advocate but I don't think it was because of his tact. On one occasion he was addressing the judge and after he had been speaking for some time the judge said, "You know Mr Smith I've been listening to you for a half-an-hour and I am none the wiser", and F.E. Smith said, "No my lord but you are much better informed." That's not the way to address your court.

So my second rule is that you need to know your audience and you need to shape your advocacy to your audience. We can all categorize pieces of advocacy in different ways. Who are you addressing? For me there are three particularly broad categories: first instance advocacy to a judge, appellate advocacy and, if one's involved in it, advocacy to a jury. They're all very, very different. The same basic requirement to communicate is there but in a different way. With the first instance

judge, you are trying to explain what the case is about. It is your first opportunity to demonstrate why your client is right and the other side is wrong. And there has to be a level of intellectual quality to what you are saying because you're addressing a qualified professional man or woman who understands the system. If you are addressing the jury on the other hand then you have a different approach. I have addressed juries both as prosecutor and as defendant. There you are dealing with a group of good people who don't have a legal qualification. But don't underestimate their intelligence or their insight. Don't play them for fools, that's a big mistake. So you then have to teach them something about the law to understand the case but without doing it in a way which makes you look as if you are being superior and above them.

And then appellate advocacy; that's one of the greatest skills because it's one of the most difficult things to achieve. There you are dealing with senior judges who've heard it all before. They often know the answer, they believe, before they come into court. I've found many times that you go to court and before you've even opened your notebook one of the judges has said, "Your problem, Lord Goldsmith is ..." Now he may have hit upon something that you thought was a problem but it's equally likely you don't think is a problem, and you have to deal with that immediately, respond to that and get back on to the track that you have started with. It's even worse if you are in the next level of appellate court, it used to be the House of Lords, now the Supreme Court where you have five judges, they hunt in packs. There you are, dealing with one in the middle or on the outside, you think you're winning the argument or responding to what they're saying and then one comes in from the flank and attacks you from the side on an entirely different point. Our Supreme Court in substantive cases normally sits in panels of five which is bad enough.

On some occasions, on two occasions when I was attorney general, I had nine of them. Terrible! Terrible! There was one lovely judge actually who was trying to work something out on his calculator. I never really understood what it was but every few minutes when I

moved on he would say, “Lord Goldsmith, come back to this,” and he would do something on his calculator and come back to me. So, you have to keep your train of thought throughout, you need to know your tribunal, you need to know your judges, if you can. This is why some advocates of experience are particularly fashionable because they understand their judges, they know their judges, what works. It’s not the same for everybody, so do your research. During a case, try to find out in advance who your judges are, and try to understand the sort of things that for them are important.

The great legal writer, Glanville Williams, he was a great writer, he was a great teacher, he was a rotten advocate and he never really got the hang of that. In his early days he said on one occasion, “Following my adage, ‘Know your tribunal,’” he said to a judge, “I’ve got three points to make. One of them you’ll understand. The second, if you try very hard you may understand. The third one is very difficult, I’m going to save that for the court of appeal.” He sort of got the idea, ‘think about your tribunal’, but he shouldn’t actually have told the judge that’s what he was doing. On the other hand, there are cases where you should leave certain points to a later stage.

For my third rule I want to turn to the art of cross-examination which is a particularly common law art. It doesn’t happen very much in the civil law system in continental Europe, for example, because they don’t have the same adversarial system. They have an inquisitorial system. And the inquisitorial system means that the judge is asking the questions not the advocate. So the skill of cross-examination is lost to them.

The key points about cross-examination are the same. You have to understand what you are trying to communicate. You have to understand that cross-examination, as one judge told me when I was quite junior, is not the same as examining crossly. It’s not about having a harsh voice and being strident. You may need to be firm but actually you want to coax an answer out of the witness. The most difficult witness to cross-examine is the honest witness; there you have

to get them on your side, and if you start to be aggressive with them, the worst will happen, they will start to give you convincing answers which are putting your client further and further down the possible success ladder. But you can by understanding the witness get a very successful set of answers.

I did a specific cross-examination once in the Canadian Bar Association in a case which was supposed to be about a family dispute where a Canadian family were disputing where a child should live, and they had entered into some sort of agreement and the mother had said she would not take the child away from this particular place. My first question was to the father: Do you wish the best for your child? Now that was a really trick question. How would he answer that? “No I don’t?” Of course not. He had to say, “I do want the best for my child.” Which leads very quickly on to the idea that if the best for the child is to move to a different city, and that was to do with languages, then he should not allow some private agreement he made with his wife to stand in his way. And that is really to make a straight point. Think where you are trying to go and try and get there early.

Actually witnesses are more guarded after they have been in the witness box for some time and I quite frequently start a cross-examination with a question I have very carefully thought about. It won’t look that way, it would look as though it had just come to me, but I would have thought through exactly how I want to phrase it and I will actually ask the question as I am rising to my feet. And it may sound very discourteous but I will never start with my witness saying ‘Good morning Mr Smith, by name is Goldsmith, I am the advocate of so and so. That puts them at their ease. I’m afraid there’s a little bit of keeping them off-guard. You do want to surprise your witness. Cross-examination is a tremendous skill, very difficult to achieve.

Rule four: Written advocacy is also advocacy. A lot of people forget this and in today’s world with more matters being dealt with by briefs and written motions and things of that sort, people think just get it down on paper and that’s fine. It’s not. It’s still being read by someone

who has to understand what you're saying. They're not necessarily going to pay the same amount of time you've put into writing it. It's got to be clear when you write it. And those people who think that as we move more onto skeleton arguments and into written briefs, the art of advocacy is dying. But in my view, they're quite wrong. Written advocacy is still advocacy.

And you have to remember the attention span of people for that reason. There are judges, there are people who will very carefully read everything you have written down; they will make their own notes and carefully analyze and go back over it. Of course that happens. But often people, particularly busy judges, will go through your arguments and get the main points but they won't necessarily take in all the subtleties, the points you want them to understand, unless you make them very, very clear.

And that takes me to rule five, which is sign-posting. It's one of the things I do a great deal which is to sign-post what I am going to say. You say to the court, "I've got three points to make." They'll write down the first point, they'll expect the second point and then the third. Somebody once said you always tell a judge something three times. You tell them what you're going to say, then you say it, then you tell them what you said. And if you listen to experienced advocates that is often exactly what takes place. Not all. One advocate took the view that he would only tell the judge once. And they got to know this and they knew that if they did not understand it first time round he would take it to the next level court and they would understand it. That's not a technique that everybody can use. You have to have a great deal of courage, self-confidence.

My sixth rule is that despite the fact that you are there to win a case that is absolutely no excuse to break the standards of ethical conduct which you as members of the bar here and I as the member of the bar in the United Kingdom need to obey. Advocacy is not a reason to misrepresent the position; it is not a reason to disrespect your opponent. I just want to pause on this for a moment because I

think it's not often always appreciated that ethical standards, proper professional conduct is not just a sort of private thing between lawyers, it's not as if you're a member of some secret society, therefore we all act in the same way. It is absolutely critical that the courts, especially courts that are busy, utterly rely upon your integrity. Absolutely fight the case very hard but never misrepresent what the position is, the law or the facts. You can tell the courts look there is a problem in this case and this is what the answer to it is. Say that as forcefully as you like but don't try to hide. And certainly in London, in England and Wales, it happens that certain advocates get a reputation for not being straight. You can't rely upon them, and in those circumstances they are not respected by the court. They may win a few cases to start off with but then they start not winning their cases. They don't become senior advocates, they don't become judges because it's been seen what they do. Very different in continental Europe.

I have a friend who went on to become a judge in one of the European courts and he sat in one case with two of his colleagues from continental European countries and after the hearing finished they went back into their retiring room and one of his colleagues said, "You asked the advocate some questions!" He said, "Well, yes, I did ask the advocate some questions." "You asked the advocate about the law! You can't do that!" My friend said, "Why not?" "There are two reasons. The first is you're a judge and you're paid to know the law, you shouldn't be asking about it. And secondly, the advocate's only going to lie to you."

That sounds like a very harsh judgment but the point is that in those courts they don't depend upon the advocates to tell them what the law is. They do their own research, they don't depend upon the advocates at all. In our courts and I'm sure it's the same in your courts, the judges expect that if they ask a question, they will get an honest, proper answer. This is part of the high, ethical standards that you must respect. At the end of the day, your clients will thank you for

that because they are more likely in the long run to win the cases because the judges know that when you speak they can rely upon you to tell the situation in a straight and honest way.

I said something about respect and I want to move on to that: respecting your opponents and above all, respecting the judge. There are some advocates who get away with this because they are sufficiently senior, constantly interrupting your opponent when he is speaking to the court. Okay, we all do it, the most senior ones do it when we think something's going wrong. But actually it's not a great way and certainly younger advocates shouldn't do it. Wait your turn, the judge will always give you an opportunity to speak. But respect your opponents. Respect your seniors and above all respect the judge. F.E. Smith got away with it but on the whole don't insult the judge; it rarely wins you the case. Sometimes if you've got a jury it may be slightly different. There was an advocate in England who, when he appeared in court, he always got the judge angry. "Stop that" "Don't do this" and "I order you not to do this" and you think, watching, this is a very, very bad technique. For him it was actually a great technique because the jury will say, "Why is the judge always stopping that poor man from speaking? His client isn't getting a fair hearing." The truth is his client couldn't get a fair hearing because there wasn't much to be said for him. By getting the judge angry he was getting the jury on his side and was able to make some progress. But that's the exception.

I want to move on to my next rule which is, don't use courtroom tricks. Marshall Hall used to come into court with lots of tissues and handkerchiefs and a great big throat spray and people brought in silver salvers with bottles of water on them. And he would make a great play spraying his throat, wiping his face, drinking his water and blowing his nose, all to distract the judge from what his opponent was saying. He had another good trick which was if he got a bad answer he would try and turn it into a good answer particularly with the jury which didn't quite understand. On one occasion, a witness gave an answer, a devastatingly bad answer which was exactly what

he didn't want, and instead of looking as if he was concerned about it, he repeated it. He said, "Ah, so you're saying it did happen on the 23<sup>rd</sup>?" He turned to his solicitor and said, "Make a note of that for our final speech, it happened on the 23<sup>rd</sup>." When his final speech came, he didn't say anything about it happening on the 23<sup>rd</sup>. But neither did his opponent because his opponent thought that's a very good point for him, I better not remind the jury.

Rule 9: adapt to changing circumstances. I've I seen people going to court with a written script, a prepared script. It doesn't work. You cannot keep on the track of that because things will happen, the evidence will change, or simply you will be asked questions which take you out of order and you cannot afford not to be able to respond. You need to adapt to changing circumstances, and you cannot be inflexible. I have seen people in cross-examinations who write everything down and say if the answer is A then go to question 4 and if it's B go to question 17; it's a bit like an examination paper. And it can work but in my experience it's extremely difficult to have worked it through and you need to be ready to adapt. When I come to my most important rule, you will see how I think one should respond to that.

Tenth rule: Use psychology or use your understanding of commerciality. You have to think about what's going on. If you are looking at a contract and you're trying to interpret what a particular clause means, think what the business people were trying to achieve. That will often help you understand and persuade the judge of what you think it means. How does this work in the business world? This provision which says payment should be made on the 14<sup>th</sup> and the question is does it matter whether it's the 14<sup>th</sup> or the 15<sup>th</sup> or the 16<sup>th</sup>. Think about the contract. You are arguing that it does. You may want to tell the judge that it matters to this individual to have it on the 14<sup>th</sup> because the bank was expecting payment and there was an overdraft and there'd be a default. If it doesn't matter you want to say that interest could be paid on the 14<sup>th</sup> or the 15<sup>th</sup> or the 16<sup>th</sup>.

Think about it commercially. But also think about the psychology. This is again extremely important if you are trying to deal with cross-examination. I've always admired in England particularly the advocates in the criminal field. It's not what happens even on the television screen. It's what happens in real life. Think through what would have happened in real life. You say you were walking down the street. What happened? What did you see? People remember things with enormous detail. We know that doesn't happen. So psychology is very, very important.

Back to my rule about trying to get an early question. This was a very high-profile case which was to do with a strike and whether or not the employers were entitled to dismiss a particular individual. They said the brick he threw broke a neighbour's window because of a personal dispute, a vendetta between them. We believed – I was acting for the employer – he was throwing it at the window because he was a strike-breaker. It was all to do with the strike and that's why they'd taken disciplinary action against him. The union was there and they made a great big thing about this and the television was there. My first question was, just to say to the individual, "Did you chuck the brick through the window because he was a scab (scab is the colloquial word for strike-breaker)?" He immediately said yes. He hadn't thought through it. It was the first question. But if I had asked, "Is it not the case, Mr Smith, that you threw this brick through this gentleman's window because he was trying to break the strike", you know, he wouldn't have understood the question and he'd have said no because he'd been told to say that. The psychology was to understand his mind and use language he would understand.

Let me come to one other thing before I come to my most important rule. I have not really said anything about the time I have spent as attorney general. The British attorney general is a bit different from the Indian attorney general because it is a political role as well as a legal role. So I sat in cabinet, I had to advise the government as attorney general on important issues but also advocate for them. And the point I want to make is that despite the fact that I was a member

of the government it still seemed to be always essential not to confuse advocacy with advice.

When you're advising your client you need to tell them what they need to know even if they don't want to know. You have to give them unpopular and unwelcome advice because that's what your job is, that's what they deserve to hear. It might not be what you say in court, you may take a different line in court. But you should tell them always what the truth, in your opinion, is. And nowhere was that more pointed for me than when I had to advise on military conduct by the British government, hugely controversial issues when to me it remained critically important to tell the prime minister and others what I genuinely thought the law was. There are occasions people know about where people didn't like the answer. There are occasions people don't know about where I actually advised against military action. Always don't confuse advocacy and advice.

So, moving on to my top three rules. Rule 1: Be clear. That is the most important thing. When you're communicating, be clear. Before I became a judge I used often to say to myself, "Why does that silly man on the bench not understand what I am saying." After I'd become a judge I'd say to myself, "Why can't these advocates be clearer?" Both illustrate the point. You are actually often not as clear as you think you are. I think it was Marshall McLuhan who explained that the medium's in the message and it's true. If I say the word 'table' you may be thinking of a wonderful table which can seat 16 people, you know, your dining room at home with ornate chairs and a table-cloth or you may be thinking of a rickety wooden thing that sits by a bedside. The word can mean different things. Although the word means something to you, it does not mean the same thing to the other person. You have to think very carefully about what you are trying to say. You actually benefit from being a judge because you learn the difficulty.

Rule number two, probably even more important: Be prepared. Preparation is everything. It's not, as I've said, a prepared script. It's

understanding the case, say you are ready to deal with it. If the judge says “What about Section 43?” you know what Section 43 is and you’ve spotted the problem. So you say, “Oh, My Lord, that’s not a problem at all. It’s been conclusively explained as meaning this.” Or saying with confidence even if it hasn’t been explained. So, preparation is critical. A great lawyer once said you have to spend eight hours preparing for every hour in court. I’m not sure if that’s right but you certainly need to spend substantially more time preparing than actually being in court. Preparation, preparation, preparation.

And my final rule is structure your arguments. I have three points. (It’s always three points. It’s a great number. Say you have four points, put two of them together to make three. If you have two, split one. You’re lawyers, you can do it!) But the critical point is to have structured it. You know what you are saying and where you are going. And that helps with the preparation because if you know in advance you’re going to be making three points, that’s what’s in your head. And if the judge says this you know that’s actually your third point and you’re going to come to it later.

Lord Mackay of Clashfern was British Lord Chancellor but before that was the Scottish advocate general, it was the Lord Advocate. He was addressing the House of Lords on once occasion when the great judge, Lord Diplock, said, “Well, Lord Mackay, what about this?” He said, “Your Lordship is asking me about that point?” He said, “Yes, I want to hear about that point.” “I told Your Lordship that was my fourth point. Is Your Lordship inviting me to deal with it now?” “Yes, we are.” “But the invitation is declined.” And he went back to continue. He was a great advocate as well, and a great Lord Chancellor but structurally he knew where he was going. I wouldn’t advise you to decline the invitation, I’d deal with the point. There’s nothing more distracting than a judge who’s still sitting there waiting for you to deal with a point that is troubling him. Maybe you don’t have an answer and you want to keep it in the background, but otherwise try and deal with it. Be courteous and if the judge keeps on coming back, saying, “I’m sorry to keep interrupting you”, “No, My Lord, it’s extremely

helpful to know what is in your Lordship's mind." What you're really thinking is, "Why doesn't this silly fool shut up and let me address him."

I want to say two other things. I want to say something about arbitration because there are differences. With arbitration growing you need to know about this particularly about international arbitration; and as India reaches out more, as it's been doing, there will be more occasions where international arbitration will come across at your desks, at least I hope so. Arbitration has changed; there's more cross-examination and there is more oral advocacy than there used to be. But there are still significant differences.

First is there's no set procedure. Generally speaking, the tribunals decide what procedure they are going to adopt. Some of the things that you regard, I regard, as absolutely basic, like hearing evidence, are not necessarily something they think they need to do. If you look at the rules of arbitral institutions such as the ICC, the International Chamber of Commerce, or the International Court of Arbitration which has a centre in Delhi as well, you will find that generally speaking their rules say they can decide. Unless the parties have agreed what the procedure is, if any of you are drafting arbitration agreements and you are very keen to have discovery, write it in the arbitration agreement. Because it won't necessarily be ordered by the tribunal. So, they set the rules.

The second difference is there is much more written advocacy than we're used to. Not preliminary briefs but substantial argument is often set out in writing. You have to get it right and you need to follow all the other rules about being clear and structured and order your signposts. Cross-examination of witnesses is not done as much. I have done international arbitrations where the idea of cross-examination is to make a speech at the witness and then put a question mark at the end of it. That's not cross-examination at all. I did a session in the International Chamber of Commerce court of arbitration with a senior French advocate and we were talking about cross-examination;

and it was not something they had done much of before. And he said to me that in cross-examination you can't ask a leading question. And I said, "I can't see any point in asking a question in cross-examination if it isn't a leading question." He got completely the wrong idea of what cross-examination was about.

There are substantial pre-hearing, post-hearing briefs which is becoming a habit I hate. Three months after the case is finished we produce a long, written document about the case. The thing to remember about that is that probably the arbitrators have forgotten everything else. Why should they remember what happened three months ago so you end up writing the whole of your case pretending of course, you are not doing that, saying "the tribunal will recall" but of course the tribunal won't recall and there's a whole skill to that. And it is a different culture because in International arbitration you are often addressing people who don't come from a common law background, who don't think as lawyers. You have to bear that in mind. It's also a less emotional experience and less aggressive. So there are different skills but the three rules still apply: be clear, preparation and structure your arguments.

When I came to consider what I was going to do after being attorney general I had the opportunity of joining an international law firm rather than going back to the chambers. To some extent I wanted to try something different. I wanted to try global law and if I've learnt one thing through my time in politics, in government and at the bar, it is that the world is truly a global village. We are spending more and more time involved with other countries as people do more and more business transactions, travel overseas. So we do need to learn from each other.

And if I have one small criticism I think that the Indian legal profession is being too insular. You welcomed me very warmly today and I am very delighted. You explained to me how British barristers were capable of being discriminatory, arrogant and superior, and you were right to make those points and they were wrong to adopt that attitude. The world is a small place and I think the Indian legal

profession can afford to be less protectionist and more inclusive. I think it will do you good. I think that being more inclusive, learning more, experiencing more what lawyers from other countries can do, ultimately will raise everybody's standard and raise the standards of justice. So my one small plea is to consider that.

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*Peter Henry Goldsmith (b. 1950) is a British barrister and a former Attorney-General for England and Wales and for Northern Ireland. He was the longest-serving Labour Attorney-General. He currently heads European litigation practice at Debevoise and Plimpton and is Vice-Chairperson of the Hong Kong International Arbitration Centre.*

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# Is Cricket Facing A Credibility Crisis?

**Bishan Singh Bedi**

July 13, 2013

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This morning I was taking a look around and the lesson that I learnt was that when you travel, never carry a pair of shoes that are as old as yourself. Fortunately for me, one shop was open. I pointed to a few designs and asked the shop assistant to pull out size 10. He said he didn't have what I wanted. Then I said pull out something in size 10, I need it very urgently. He did and I was very grateful. Then he looked at me and asked, "Where are you from?" I asked him why he wanted to know that. He said, "You look a little out of place." I said, "Yes, I do look out of place." He said, "Come again." I said, "I hope not." I will be better prepared next time.

The invitation to speak came about two months ago when there was a lot of rubbish in cricket, namely match-fixing and spot-fixing. In between, the Indian team won the Champions Trophy in England. I have always believed that whatever good happens in cricket, it just happens. Honestly, there is no planning, we don't have any strategy. It just happens because of passion for this game; the passion amongst followers is unreal.

Only yesterday I was reading a comment from [the film] *Bhaag Milkha Bhaag* where Milkha Singh blames the media and cricket for other sports not being promoted in India. He was very bitter. If cricket is popular and more widely accepted than other sports, what is the problem with that? It is very difficult to convince other sportsmen that we all have an equal opportunity for a place in the sun. Cricket is popular, we all know, and it is sold very well in the country. In the present context, perhaps oversold. Now, I don't talk about cricket all the time because I am a cricketer. I just hope I am discussing some cricketing philosophy. For me, cricket was more than just a sport, it was a way of life.

I have to ask all of you here the difference between sin and crime. We all may have sinned a million times, but we are not criminals. If we were criminals, we would be in Tihar. Sin is a thought which occurs in the mind. Crime is implementing the thought. Today, we find cricket and criminals, chuckers and bookies going hand in hand. There is nothing surprising about this. Cricket is the only sport that reflects the times we live in. Only now are we bringing about legislation to keep criminals at bay and the sports ministry is very keen on bringing the BCCI under the RTI. When the same RTI was going to cover political parties, they all revolted. Can you possibly have the cake and eat it too?

This is where the cookie crumbles. The BCCI officials became prominent because the media covers the games and other events. They are not coming here to see the game. They are coming to be seen. Now that there are so many cameras all around the place, there is often a chance that sooner or later, a camera will focus on you. So, you will do something outrageous to be noticed. My son, about 12-13 years ago, came to me and asked, "What is the thrill in getting a man out?" I said our job was to get wickets and when we got them, we were grateful. The length of the pitch hasn't changed in the last 150 years. The height of the stumps hasn't changed in the last 100-odd years. Even the width of the bat is the same. So, what has changed? The

change is in the producers, the actors and the directors. It's a tamasha where people come to be seen.

On the cricketing front, the type of change we are witnessing is very new. It wasn't there earlier. We were fortunate to have a very good captain, 'Tiger' Pataudi. He wouldn't come and hug you all over the place. People believe that IPL is entertainment. You know, when cricket was invented, it was to lift people out of depression. And if anyone didn't play cricket, they would be considered an outcast. Cricket started as entertainment. And there is an English proverb attached to it: "This is not cricket." We never say, "This is not hockey, this is not football." Why cricket? [We use this phrase] not just on the field but in any institution, in any corporate office or in any decision-making. If there is anything improper happening, the phrase immediately used is, "This is not cricket."

Cricket is directly linked to honesty, uprightness and integrity. My version of cricket is related to spirituality. It is a wonderful emotion. Why are we god-fearing? Why can't we be god-loving?

I took up this game primarily to lose weight. When I was born a family friend decided that I was going to be a sessions judge one day. My mother used to carry me to the district court every day to try and convince me of this. That became a joke until I graduated from university and I had nothing to look forward to. But I still had two more years to play for Punjab University in the inter-varsity tournament. So, I joined law in Chandigarh. My father then said to my mother, "Look he might become a sessions judge one day." It so happened that while I was doing law, I got this break in the Indian side. But when the college was working, I was playing cricket, and when I was free the college was on strike. So, it didn't work out. That is how I got a job in SBI. In those days it was important to be working for a public sector undertaking like SBI, the railways, etc.

Professionalism [in India] as we known came up in the mid 90s, not that the BCCI was short on money. They were quite happy to see

giants of Indian cricket taken for a ride. Just before I started playing, players used to be paid ₹ 250 per match. In one Test match, India beat New Zealand in four days and the Board deducted 50 rupees from every player because the game did not go up to the fifth day! People like Vijay Manjrekar were there, but not a single soul raised his voice. When I played, we got paid ₹ 700, then it became 1,000 and then 2,000. We won three games back to back and it was still 2,000. Win the Champions Trophy now and the whole team gets ₹ one crore each. I have no complaints about that but weren't they supposed to win? And if they won, have they done something extraordinary? After all, they have been paid to play for the country.

I am not making comparisons but it is important to bring to your notice that I played county cricket for 6-7 years as a professional for Northamptonshire. As I was working at State Bank of India at the time, I had to seek leave for six months without pay. That was considered normal. Now you are centrally contracted with the BCCI and you are paid for the matches and you are still on the rolls of an ONGC or Air India. Now I want to ask some of the income tax luminaries sitting here, can you earn at three-four different places? How are you calculating the tax returns? This can happen in India, not in England or anywhere else.

We talk about cleaning Indian cricket. When was cricket ever dirty? Cricket was never dirty. Cricket is the cleanest physical activity one can indulge in. I want to talk about the role of people and I am talking purely as a player. It is the players who caused the havoc in world cricket not just in Indian cricket. In the 'Bodyline' series Douglas Jardine made seven fielders stand behind the batsman. The authorities took it up and ever since you cannot have more than two fielders behind the batsman. So, a cricketing captain was stretching his strategy a bit too far. When we were playing in Jamaica, they were bowling 7-8 bouncers an over with the second new ball. The bouncer to our mind is the most legitimate weapon for the fast bowler. If you can't bowl more than two bouncers an over, who asked for it? The players! There was a time when the two captains used to go and toss.

Then what happened? Viswanath in his first match as captain against Pakistan said, “You won it”, the other captain said, “No you won it”, and this went on for a while. Eventually he said, “We will bat first.” Now the referee goes out with the two captains for the toss. Who asked for it?

Ball tampering was started by the players. Using various methods, they take undue advantage. That is why now after the fall of every wicket, the ball is given to the umpire. There is a huge cloud of suspicion. Nobody knows how match-fixing takes place. But we have a clue because we read stories in the media. And the ICC with all good intentions is struggling to get a grip on this problem. But chucking is happening right under your nose. Nobody is able to do anything about it. You don't need rocket science to prove that someone is chucking. A year ago, I met Harbhajan on the field and he said, “Paaji why are you against me?” Why should I be against him, you tell me? What do we have in common? I said I have a problem with the ICC for allowing you to do what you are doing.

Venkat [former test cricketer S. Venkatraghavan] was umpiring in an England v. Sri Lanka match at The Oval. When our friend [Muralitharan] got eight wickets and Sri Lanka beat England, I happened to be there. I called up Venks and said, “What happened to the 16 wickets?” He said, “Shhhhh.” You see there was a time when the ICC was a cricket conference, the Imperial Cricket Conference [and later the International Cricket Conference]. I like to think that both England and Australia were pretty fair in many decisions they took. And then it became the ICC. The World Cup was moved from England to India in 1987 primarily because two or three Board officials could not get tickets for the show in England. It was fair enough to extend the World Cup to the world. It was moved to show the strength of the votes. And we had a very ambitious cricket official who wanted to be chairman of the ICC.

I was talking about this chucking business in England once. It is not easy to convince them on cricketing matters. But when I told them that cricket has always carried plenty of social connotations, they said

how do you explain that? What would you call another man in a woman's life? It's doosra. Similarly, another woman in a man's life is a doosri. If doosra is not legal in marriage, how is it legal in the field? Now, the ICC is a parent body and it has enormous capacity to rule and to gag. Players, umpires, commentators are not allowed to say a word on 'chucking'. We are all dumb and mute. We are as good as turning our backs on rape in Delhi. I'm pretty emotional about this particular issue because so much damage has been done to this game by these fellows. I counted 25 chuckers in the IPL last year. About two years ago, Venkatraghavan as Director of Umpiring took a very bold initiative. He instructed umpires to stop chuckers and 142 bowlers were stopped. I said good. What about the big fish? Somebody has to bell the cat. Three years ago, I happened to meet [former Australian wicket-keeper] Adam Gilchrist at one of the functions. He said I want to congratulate you because you are the only one talking about chucking. Now we as human beings have the advantage of expression which animals don't, and we have the benefit of words along with sound and we don't use it.

Cricketing philosophy should stand upright now more than ever before. I used to interact with Sir Donald Bradman. I once asked him, "Sir Donald, would you have scored the same numbers as you have?" He said, "I wouldn't have scored the same number of runs but they wouldn't have gotten me out either. I would have adjusted." On another occasion I asked him, "Why do you watch Kerry Packer?" He said, "I watch it because I want to know what the hell is happening around me. There is cricket in my life. I want to know what is going on." I watch IPL the same way. I watched an interview with Don Bradman, it was a very beautiful interview. The last question was, "Sir Donald, how would you like to be remembered?" He said, "As a man of integrity." How many of us can put our hands on our hearts and say that? He was the ultimate with everything about cricket. I also asked him why he didn't turn professional. He used to work before and after the game as a stockbroker. He said, "I didn't want to lose out

on the fun of the game.” There was so much to learn from that man every day.

To my mind a good cricketer is one who is a good student of the game, and a good administrator of cricket is a good servant of the game. To me, cricket is the boss. Do not take your eyes off the ball.

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*Bishan Singh Bedi (b. 1946) played cricket for India from 1966 to 1979. He was a slow left-arm orthodox spinner. Master of flight and of subtle variations of spin, he took 266 wickets in 67 Tests. He captained India in 22 of them.*

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# India and the World

**Narendra Modi**

October 18, 2013

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Nani Palkhivala was a leading lawyer and an expert on taxation and budgetary matters. But to my mind, his biggest contribution was in upholding the Indian Constitution. Sometimes I think had it not been for people like him, the basic structure of our Constitution would have been different by now. In addition, you may also recall that Nani Palkhivala was appointed India's Ambassador to the US during Janata Party rule when Atal Bihari Vajpayee was Foreign Minister. In a period of two years, he was able to generate a special respect for India in the United States.

Also, as a gifted economist, Palkhivala kept warning against the dangers of populism on the one hand and excessive bureaucratic control on the other hand. Whatever he did, he did with distinction. But when I focus my attention on him, I find his legacy even more impressive than his life. The spirit of charity and the spirit of humility are displayed in his will. It says and I quote, "Burn what is left of me and scatter the ashes to the wind to let the flowers grow. If you must bury something, let it be my faults and my prejudices against my

fellowmen. If you wish to remember me, do it with a kind deed or word to someone who needs you. If you do all I have asked I will live forever.”

You will agree with me that this can come only from someone with a heart and mind who actually lived like this. Truly he will live forever in our memory. In short, he was known for his tall works, including his famous book, *We the People*, but many people may not know that his personal life and the message from that life are even larger. I pay my tributes to this great son of India on this occasion.

Today I've been asked to speak on the topic, 'India and the World'. At the outset I feel that we are lucky to be born in this country. It is said in our scriptures that India is a land where even the Gods want to take birth, and we have seen Gods being born on this soil. Our scriptures have also shown us the way to relate with the rest of the world. The path is 'Vasudhaiva kutumbakam' [the world is a family]. It is the guiding principle for us while dealing with the world. When you start treating the whole world as a family, the ways for dealing with each other become smoother and smoother. The manner and the message of India for the world is our peace and harmony. This has come from our culture and also from leading lives like Mahatma Gandhi. Gandhiji gave importance to the moral dimension in the conduct of person as well as nations. That is why even India's freedom struggle was not just about gaining India's freedom from British rule, but Gandhiji made it part of a wider global anti-colonial movement.

All these principles will have to continue to shape India's foreign policy even today. These are our foundations which we cannot and should not dilute. In fact, this was the bond with which India and Africa fought together. This was the bond with which Gandhi and Khan Abdul Ghaffar Khan fought together. Also, we have had history when we were one with many neighbouring countries of today. It was a greater India. We might have heard the words 'Bruhat Bharat' and 'Sanskritik Bharat'. This was not only in a territorial sense, it was more so in cultural and sentimental terms. They were binding forces

that came from our roots. The policies during British rule divided us internally as well as internationally. In fact, after Independence, the first task should have been to collect all those threads and weave a harmonious neighbourhood. But unfortunately, we lost 60 years. With this background I would like to list out a few ideas on which our foreign relations should be shaped.

Our deep-rooted beliefs and our culture should be the foundation. India can offer a lot to the world and can become the alchemist of the world. Today the whole world is living under insecure and unstable conditions. This applies to people, society and also nations. This instability basically arises from relationships. It arises from the lack of a capacity to understand and accept the viewpoint of others. Here also our culture and practices teach us restraint and balance. These are our healing powers, which we can use in healing international relations. Normally we talk about soft power; today, I want to add one more dimension: our healing power and that is our cultural strong base. Our geography, our location and our neighbourhood always remain important parameters. Neighbours do have some common thread that binds them. For example, for many Asian and East Asian countries Buddha is a common thread. We should strengthen this thought.

In addition, neighbours must be useful and helpful to each other. Many neighbours look upon India as a big brother because of its size and resources. But the status casts upon us a lot of responsibility. We have failed to play that personalized role properly. We have also failed to play a professional role with other neighbours when there were challenges. Shri Arun Shourieji's book, released today, brings out that failure very beautifully. The book explains how the Chinese perceived India and how India is making a mockery of itself with its limited, timid approach. 'Self-deception' is the right title of the book, and the cover page itself clearly reflects India's policy towards China. When Arun Shourieji showed him this picture, the Dalai Lama laughed and said yes, this is the policy of India, it allowed China to dominate India across international policy. Thus, we remained insensitive where we

needed to be sensitive, and we remained weak where we needed to be strong. The same policy unfortunately is continuing even today. The other pillar of foreign policies should be our strategy and security interest. I think for the first time it was Atal Bihari Vajpayee who showed us the way in this regard. He worshipped both Shakti and Shanti. He conducted nuclear tests and declared the nation a nuclear weapon power.

After the first test, the world had imposed sanctions on India. On 11<sup>th</sup> May the nuclear test was conducted. So, all our people said this was the result of the efforts of our scientists and our scientific advancement. The credit did not go to Atalji. Any country after economic sanctions will become afraid. After the first test on 11<sup>th</sup> no country will attempt again. But Atal Bihari Vajpayee's political will was such that even after the sanctions, again on 13<sup>th</sup> a nuclear test was conducted. The power he got from the message sent out to the world after the nuclear test on the 11<sup>th</sup> increased after the 13<sup>th</sup> May test.

It shows political will, it shows leadership quality, it shows commitment to the country's security. Atalji did not bother about the sanctions, he did the second test within two days. In spite of the sanctions the Indian economy or the currency did not suffer. The currency did not suffer, inflation was under control during Atalji's regime. Price rise was not an issue at all, prices were under control, though it was also a time of natural calamities like droughts and cyclones. We must remember those periods. At the same time, he also committed to the world for "no first use" of nuclear weapons. Here it shows the Shakti Upasak and Shanti Upasak. And this is not a small decision. Yes, I have, but "no first use." And it requires courage to take such a bold decision and he did it. He was able to immediately convince countries like Japan. We know Japan is very, very sensitive as far as nuclear weapons are concerned. But it was Atalji who could convince even Japan. That shows political will, that was the success of diplomacy. Atalji could do this because within the country he had the full confidence and support of the people.

This is what is required when we talk of strategic interest. Unless and until one gets support from the people and the party, we are the sufferers. The current dysfunction in Delhi has prevented even much needed military modernization and upgradation of India's defence infrastructure. As a result, the Indian armed forces are under great pressure on the northern and western frontiers. Thus, there is a need to revive the diplomatic leadership of Atalji to build a strong India and to have a self-confident and productive engagement with the world. This is the tradition which is rooted in our civilization. It is reflected by Buddhist teachers, Hindu priests, Chola sailors and Gujarati traders who connected India to the world in the past millennium. Here, terrorism deserves special mention. No country has suffered more in recent times than India. It is central to our foreign policy, and terrorism is driven from abroad. Atalji was able to make terrorism an issue in international fora and countries supporting terrorism were isolated for the first time.

When people discuss the NDA's foreign policy, I must remind them of one thing. Over the last 50 years Pakistan has been raising the issue of Kashmir successfully in all international fora. For the first time, Atalji placed the issue of terrorism at the centre-stage of all international fora and because of that those who believe in humanity came under one umbrella. Countries supporting terrorism were isolated and this was the greatest achievement of India.

However, in the recent past, our response has been weak. Our approach should be more serious and robust. We need to unite the world against terrorism. Also, modern warfare is going to be in the form of proxy wars. This includes cyber-attacks. Now the wars will not be fought on the borders but within borders through such means. We need to prepare a strong wall against it, and please note that firewalls made by human life will not be enough. What we need are walls made up of human hearts against such crimes and attacks. This is where India's strength lies.

With this trust in humanity and talent in IT India has the capacity to save the world. Business and commerce are going to be very, very important. Now the foreign policies are being shaped by commercial interests. The commercial dealings of individuals and companies are forcing the political leadership of countries to adopt particular foreign policies. I believe a strong economy is the driver of an effective foreign policy. So, we will have to be strong in economic terms and in the commercial sense. We have to put our own house in order so that the world gets attracted to us. Our foreign trade should be favourable with more exports. Moreover, our products should demonstrate quality. I believe a strong economy is the very foundation of an effective foreign policy and successful national security strategy.

In the present era, global warming is a big challenge. Countries with good solar radiation can form a club like G8, G20 and OPEC, and give the solar energy movement a faster pace. We have to offer what we can offer to the world. This will give us bargaining power at some point of time. Once when our PM was leaving for a G8 summit I wrote a letter to him that why not we plan a summit? Why not a club of our own? I said where there was maximum solar radiation, those countries should form a club and India must lead it. I even gave a name to the club, 'Sunsun Movement'. I requested that we create a corpus fund and conduct research on the solar sector and harness solar energy so that we can stop dependence on petroleum energy and avoid spending money on imports and become a strong force ourselves. But you know what might have happened to my suggestion.

The last point which I consider very important today relates to what we can give to the world. One must accept that only if the world feels that it is beneficial to stay close to Hindustan will they turn towards us. We are living in a time when relationships are based on give and take. So, we have to think how we can be useful to the world. How can we create an India where the world is forced to come to us? In order to have prominence in global affairs, India has to create institutions and intellectual property. This would be our soft power.

In ancient times we know that Nalanda and Takshashila and Vallabhi were such examples. Today many countries are using India's medical facilities. Medical tourism to India must be promoted. Indian yoga, our ayurveda and our holistic healthcare are our old strengths. Similarly, our heritage is a strong power. Tourism is a huge economic activity in the present age. It is estimated that there is approximately three trillion dollars' worth of global business in tourism. If there is such a big global business, where are we? Through tourism there is an opportunity for India to become strong by bonding at the global level. Moreover, it promotes understanding among people and nations. It is my conviction that terrorism divides, tourism unites. So, we must promote tourism, and as far as investment is concerned, with minimum investment you can get maximum jobs in the tourism sector. It's the most economical activity.

In addition to our own heritage even our present strengths can be used strongly to increase our influence. With our youth power we can service the whole world. Our IT professionals are known world over, our sports can create networks for international dealings, our doctors, teachers and nurses are another force. They are all areas of our soft power. We should engage them in a meaningful manner. We are a large country, with almost one-sixth of the global population. The question that comes to my mind is how can we be in such a pitiable condition? When we are attacked only statements are made. When our soldiers are beheaded only press-notes are considered enough. China intrudes. We see, we will see. Pakistan will behead our soldiers, we will wait and act later. When our soldiers are killed by bullets, they remain silent. There is apprehension among the people about the direction in which the country is going. There is tension among the people of this country. There are so many issues with neighbours, like the harassment of our fishermen. I don't understand how such a huge country cannot solve the problem of the fishermen. All this is happening because there is no seriousness. Our Foreign Minister, what a shame. Our Foreign Minister reads the speech of another

country. Tell me frankly, in an international forum, our country's Foreign Minister is reading out a speech about another country. Only after three or four pages he realizes he is the Foreign Minister of our country. What can we say?

The Foreign Minister visited China, that too at the time of Chinese aggression. China had intruded into India. At the time of great tension between the two countries, he visited China. What happened in China? He visited Beijing and made a statement that he likes Beijing so much he would like to stay there. China is attacking us and he is going for discussion on this issue. Is this the courage of India's Foreign Minister? He has gone to China for discussion and if he likes the city so much let him just stay there. If only such people remained there. We don't need them here. That is not a policy, it's a mockery. This has to be changed. For that we need to take ourselves, our country, and our jobs seriously.

There's no seriousness at all, they don't think these are issues. Secondly, we must show the world that India is vast and India is powerful. India is not just Delhi, note down, India is not just Delhi. Foreign policy has to be driven by people, not big politicians sitting in Delhi. A time has come when the cultural and economic strengths of different States have to be leveraged for building our global position. It was because of local initiatives that our predecessors developed relations with foreign countries. States have to be encouraged in partnering with foreign countries. In Gujarat, we have a partnership with Japan and Canada for our Vibrant Gujarat event and other economic activities. Similarly, it could be on the basis of culture and language, like Goa and Portugal, Pondicherry and France.

Should our link with the world be only through the External Affairs Ministry? Is there any role for the States? I have a few suggestions. We have 30 States. If one State is given one country to take care of, will that State be able to do it or not? If Tamil Nadu is told to take care of one country in the world, can they take care of it? Globally 30 countries can be strongly linked with the States. If a country is

linked with a State, the people in those States can learn the languages of the country they are linked with. If in each of the 30 States some 500 teachers learn the language of 30 countries, you can imagine how strong we will be in the world. It's not difficult. The question is vision, strategy and will to do that. We can do it.

Why can't international conferences be held in States? Why does everything happen only in Delhi? Whenever conferences are held people come to Delhi and go away. Imagine tomorrow the British Prime Minister comes and the meeting is in Chennai. The (Indian) PM will come, government officers will come. Tamil Nadu bureaucracy will get exposure. There will be capacity building. You can build tourism. When a conference is held in Banaras, the city will be cleaned in preparation, there will be advantages. People will come and the world will talk about Banaras for a week. Can we or can we not do it? Pakistan's President came and Atalji had the meeting in Agra. Indira Gandhi met Bhutto in Shimla. Through these instances we can see that there can be 'branding' of the country and its strength will improve. When our Prime Minister goes abroad, he can take the leader of the State with which that country has a connection. All this can happen. As long as attempts are made to bring the whole world to Delhi, this will not happen.

When Atalji was PM he took me with him to Russia. In Russia there is a city called Astrakhan. Gujarat and this city had a sister-state relationship. Look how our ancestors built relationships and worked with the world. Today if you visit Asian countries, you will see their influence and contribution. Go to Malaysia, you will see the contribution of Tamils there. If you go to African countries you will see the contributions of Gujaratis. They built a people-to-people bonding. When I went to Astrakhan I asked for chai. When I said "tea" they did not understand. When I said "chai" they said "Oh you want chai" and they brought tea. When I said "door" they did not understand but when I said "dwar" they did. I said "tarbooj", yes they understood, they use the word. So much of our influence in in their

city. When I went to a shop in Astrakhan I found the name of the shop was Okha. Okha was [is] a port in Gujarat near Dwarka. Even today in Astrakhan if you want to buy a genuine thing of good quality till today people still trust the shop called Okha.

What I am trying to say is why not take a cue from our ancestors and harness our strength and the power of our States, our society and create a link with the world? We must think about this. I am confident that our States are fully capable of ensuring a harmonious relationship and there will be a sense of belonging apart from their benefiting from the relationship. If we make this connection with 30 countries, who can put us down? We can become a globally strong country.

Similarly, our people are there in almost all countries. Indians abroad have been a strength for our nation. They are our biggest ambassadors. We have to make use of them in this area more actively. At the same time, we have to take better care of them when they are in trouble. Wherever Indians are in the world, whatever the colour of the passport, the colour of their blood does not change. The blood relationship does not change. Even if the passport colour changes, they are of Indian origin, their blood is Indian. At the same time, I repeat, we have to take better care of them when they are in trouble, like the Tamils in Sri Lanka.

I'm an optimist, we have the strength of character not to harm anyone. The magnetic power of India lies in its culture and traditions. Also, we are the biggest democracy which is the flavour of the world today. Our human and natural resources are enough to influence the world if used properly. With this strength, I am sure India has to play, and will play a major role in world affairs. The present century is going to be the century of Asia. In that sense with our brotherly policy we would be able to contribute on that front. With our traditional strength and modern initiatives, we will also be able to provide solutions to many global issues. By and large the world has accepted that the next century is Asia's century. It is our responsibility to see that the next century is India's century. For this we will have to perform.

Let us together work for a bold India and a better world, a harmonious neighborhood and a healthier world, a strong Asia and a safer world. My personal conviction is that India can play a major role and we must take an oath that the 21st century becomes India's century.

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*Narendra Modi (b. 1950) has been Prime Minister of India since 2014. He was Chief Minister of Gujarat (2001-2014) and was elected to the Lok Sabha from Vadodara in 2014 and Varanasi in 2019.*

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# Are We Ready for the Fourth Industrial Revolution?

**S. Ramadorai**

February 27, 2016

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As we remember Nani Palkhivala today, I cannot help but recall my own special moments with him, when he guided the early days of TCS as chairman of its executive committee. I first met him when he was already a much-respected figure in Bombay House. He would visit America and Europe for a week each at a time during the course of the year, and I had the opportunity to observe him at very close quarters. He had the ability to accomplish so much on a very very short visit. He was indeed a master of time management and would return to India, after having met the maximum number of customers in a week. Furthermore, each one of these meetings with our customers was marked by precision not only in time but in thought and action. I truly learned a lot from him. He was a rare human being with a rare intellect.

Mr Palkhivala is a leading living legend who continues to inspire us. Gifted with the ability to see far beyond his time, his views are as relevant today as they were then. Through his association with TCS, he witnessed the changes led by the digital revolution and I would

like to imagine he would be optimistic about the potential of today's technologies. I'm sure he would have striven to make India a more inclusive community, one in which human rights and equality of opportunity would flourish.

I got into this skilling space after retiring from TCS, at the request of the then Prime Minister, Dr Manmohan Singh when it was a scale problem at the end of the day with regard to the skills challenge of our country, more importantly the vocational skills space. Essentially, how do we create a future-ready workforce as the market emerges and as the country grows, the sectors of the economy grow and we look at this whole space within the government. Some corporates, including the Tata Group, got into the space, and the Tata Group got in to the space through what we call as the Tata Communities Initiatives Trust. Within that one of the initiatives was what we call the 'Tata Strive', which is the skilling part. We collaborate with the Tata Trust, we collaborate with the corporate sector, we collaborate with the NGOs because we have to deliver on the ground for impact. We need to be creating an ecosystem that includes all the players. One of them was with Siemens with whom we are currently partnering and where we are putting together an advanced diploma programme both in terms of theory as well as hands-on experience. For today's lecture I have chosen what is being called the Fourth Industrial Revolution for its huge disruptive effect on the world and each of our lives. I borrowed this video from Siemens to play for you.

### ***Text of video presentation***

*In the factory of the future both the work-piece and the machine will be intelligent. They will be completely networked and control production autonomously and in a way that is more efficient and uses fewer resources than ever before. The possibilities are so vast and groundbreaking that many experts refer to it as our Fourth Industrial Revolution – Industry 4.0.*

*The first steps towards Industry 4.0 have already become reality. It all starts when mass production components become a unique item with their*

*purpose predefined at the outset. Because even before manufacturing, the component exists in virtual reality, including all the information required for its production, but all the other necessary components also have to be mapped into the virtual world. They also get names and addresses and a personal identity so that they know where and when they are needed in the production line or process. Equipped in this way, they are able to negotiate their way through the digital factory for kilometres before reaching the destination.*

*Arriving at the processing station the work-pieces are identified and the machine calls up in real-time all information needed for processing. After each station the work gets checked automatically either optically or by using other measurements. Deviations from target specifications can thereby be discovered on the spot and faults can be eliminated quickly. If a machine requires maintenance it issues an appropriate request before shortages or breakdowns are experienced. The amount of resources used is immediately recorded in the system and stocks get updated. During processing all relevant data of the product is stored in its own digital product memory. This means that every stage of production can be traced precisely.*

*In the factory of the future, machines and work-pieces will even communicate directly with each other and make autonomous decisions about the next production state, comprising a system that is decentralized, efficient and flexible.... But for all this technology, humans are still crucial. Even in a highly automated production environment, creativity, experience and the ability to assess and evaluate situations remain irreplaceable, but technology can provide valuable support. Operator Safe Control Systems already allow automatic and manual production to be combined, and regarding quality control employees use augmented reality to determine whether the product meets the required quality standard and can be shipped to the customer. Electronics and software allow for even higher levels of networking to be reached. Completely new complex systems have been developed in next to no time. The German electronics industry is at the heart of this rapid change with its own innovative products.*

*Some important questions need to be resolved before factories become truly smart, including topics such as standardization and IT security. The opportunities provided by Industry 4.0 are enormous. Productivity can be increased by up to 30 per cent and both the quality and diversity of products will significantly rise. At the same time, the period between development and production will shorten. First, Industry 4.0 will make a decisive contribution towards maintaining and improving Germany's competitiveness as an Industry Allocation Centre.*

What you can see from this is this revolution that will envelope us at a pace and scale that's absolutely mind-boggling. It also presents us an opportunity as a nation to carve out a unique developmental trajectory by leapfrogging technologies and stepping forward from conventional models. After all, our society has entirely leapfrogged when it comes to personal computers and mobiles; we have leapfrogged over the landline. Disruptive, exciting, pregnant with potential, that's how I see the future in the Fourth Industrial Revolution, and I'm here to share with you what it could mean to our country and how we can be better prepared for it.

Now, what is the Fourth Industrial Revolution? You got a glimpse of that. When you look at the evolution of mankind, we see periods of dramatic technological advances. The First Industrial Revolution of the eighteenth century started with the advent of the steam engines. The Second Industrial Revolution brought electricity and mechanization which dramatically changed manufacturing. Over the years we saw an increasing level of mechanization and the infusion of electronics which peaked during the twentieth century. Then another sweeping change in the 1960s was brought with the development of semiconductors, digital circuits, and of course computer signalling, the onset of what we called the Third Revolution or the Digital Revolution. With that began the Information Age and information communication technologies or ICT as we call it.

This essentially shrank the world into a global community. While the earlier revolutions, namely the first, second or third, took decades

to spread their impact across nations, the digital revolution took the world by storm by essentially its pervasiveness, pace and the scale of impact. We are living through the changes it brought and we all know that it has changed the way we communicate, live our lives, get entertained; we are aware of the impact of businesses making innovative, continual change, a survival rather than a competitive factor. Unless you're part of the digital revolution, you will become non-existent, you will become extinct.

Governments have been challenged to find creative new ways of better governance, adaptive regulatory frameworks, and of course an enormous amount of greater citizen contact. In short, the status quo is no longer relevant. Constant adaptation and adoption is going to be the new norm. But even as we struggle to keep ourselves abreast of the dynamism around us, we need to be aware of the technology winds blowing our way. As everyday experiences become more digital, digital gadgets become our constant companions in various corners of the world. Innovators are excitedly working on ways in which we can manage our homes, our professional demands or travel more efficiently, by enabling a world of seamless interconnecting experiences.

Now I would like to share some experiences. When I look at the mobile, what you're holding in your hand in terms of processing power, it is more than what NASA had when it sent man to the moon. That's the power of what we have in our hand. But even this is set to change. The enormous computing power connected to the cloud will soon become the key to managing our lives. It could, for example, enable your refrigerator to sense when it is low on supplies, alert you and send you a predictive list of things to order. You could click an order straight to your grocer, your order gets picked up by a driverless car through a series of checks along the way, including invoices that debit your account. This is not fiction, but soon to be a reality! Smart refrigerators have already been launched, and Google's driverless car is already making test drives in California. Let's take another example. In our desire to extend our lifespan, we already have

fitness wearable devices that track heart rate, etc. Soon will become mainstream wearable fitness clothing, biometric smart shirts with blue tooth connectivity, that sync with other fitness applications. Also, wearable materials will slowly inject measured doses of medicines into our bodies, with new organs being created in petri dishes.

Recently a Fitbit revealed that its owner's heart rate was significantly elevated. Though the Fitbit did not predict that she was pregnant, this turned out to be the case. The next generation of fitbits might predict not only pregnancies but also other medical conditions both for men and women. Experiences such as these make the Fourth Industrial Revolution hugely exciting and path-breaking, as it blows the divide between devices and materials, the human body and mind – the integration essentially of the digital and the physical world. To some, this may seem like an incremental or linear shift from the third revolution of the digital era, but in reality when the virtual, biological and physical systems come together, we cannot ever predict the technological advancements it will bring, but what we do know is that it will dramatically change our lives.

Now, what I want to talk about here a little bit is what are the key technological advances that are driving this revolution. One of the key technologies driving the dramatic change is artificial intelligence, one of the most exciting scientific quests is that of artificial intelligence or AI. This works on the premise that human intelligence can be simulated in machines, through software in computers. The application SIRI on your iPhone and face recognition in your Facebook photos are nothing but examples of AI. Once considered cutting-edge, they've quickly become the new norm. AI will enable computers understand the semantic content of a language. The American quiz show Jeopardy involves similes, jokes and riddles, and it requires a higher order of language processing that only a human mind is capable of. But IBM's Watson computer won against the human mind, that too in 2011, almost five years ago.

In India what we have done in TCS is we have mimicked the human neural system to launch what we call IGNIO, a platform that automates and optimizes IT operations. The IT system comprises hardware and software that are the heart of smooth operations of a business. As we have more automation these systems become highly complex. Here is how IGNIO works. It gathers every bit of your IT data, then it does three things: eliminate things that can be eliminated, automate things that can be automated, solve problems itself and pass on to humans what it cannot solve. The most exciting field related to AI of course is robotics. Don't be surprised if you are greeted by a robot on a future visit to your retail store. Robots can travel shops' aisles checking up to 20,000 individual stock keeping units with over 96 per cent accuracy. Given that global retailers lose nearly 450 billion dollars annually as a result of out of stock items, this is a huge productivity gain. Not surprisingly, Japan is investing to build 30 million robots to create a workforce that can make Japan the number one manufacturing destination again.

The second technology is what we call the convergence of nanotechnology, biotechnology and healthcare. While the Fourth Industrial Revolution will enable more intelligent machines to enable better health for all, man's eternal quest for life without disease is driving the convergence of nanotechnology and biotechnology resulting in more effective treatment and prevention of disease. We all know the case of Hollywood star Angelina Jolie, who made famous genetic testing for BRCA the mutation of which increases the risk of breast and ovarian cancers. On the same lines, nanotechnology in medicine will enable nanoparticles to deliver medicinal drugs to specific cells. The nanoparticles are designed to be attracted to only the disease cancer cells. For example, reducing damage to healthy cells as we see today in chemotherapy, is essentially targeted at personalized medicine.

The third technology is 3D printing. Even as we reduce damage to organs, there will be technologies that will help create new organs.

In an exciting experiment, Princeton University used 3D printing technology to create a bionic ear using cell tissue. The Fourth Industrial Revolution is revolutionizing the way we manufacture things. While your home printer prints on paper for 2D, 3D printing is about printing layer upon layer to create a 3D object. The beauty of this technology is that it enables the creation of customized physical objects. Given the customization possible, the 3D printer could print a solid life-size physical model of a body part for surgeons to visualize, plan and practice surgery. Before doing an operation on conjoined twins, Chinese surgeons used the 3D replica of the conjoined body parts to decide on a more precise starting point for the separation. A similar experiment was done, to practice a complex surgery, on a 3D replica of the heart of a five-year-old patient.

Local Motors, an American motor vehicle manufacturing company, builds cars almost entirely through 3D printing, with a design crowdsourced from an online community. Completely crowdsourced design from an online community can build a new model from scratch in a year for less than the industry average of six. Vauxhall and GM (General Motors) among others still bend a lot of metal but also use 3D printing and rapid prototyping to minimize the time to market.

The next one is the Internet of Things. The one technology that has a direct impact on you and me is the game-changing Internet of Things or IoT. Simply put, the internet flattened the world making one world a reality, and social networks made one people a reality. From connecting computers and people we are moving into an age of connected people and things, and hence the name Internet of Things. Potentially, all our devices, our air conditioners, refrigerators, cars will talk to each other. In the future, we could use not just our mobile phones, but our voices and perhaps even thoughts to connect to a network. Several companies are now digitally enabling objects. Every manufactured object will be a state machine. We'll be able to connect it to the internet to turn it on and off. In turn, every manufactured object will not only have an internal ability to sense

its environment, but will also be enabled with actuators to respond to a changing environment. For example, a rooftop solar panel will not only be able to sense sunlight and keep changing its orientation throughout the day with motors that respond to the light sense, but may also be able to sense the temperature of the panel and turn on the water-cooling system as well. For businesses this means electricity grids or manufacturing assembly systems could all potentially talk to each other and in the process enhance efficiency exponentially. The reason for the great excitement about IOT is the huge impact it will have on our everyday lives, on business, on nations, and of course productivity. Before you think that IOT is only for high-end impact here is how it will impact agriculture..

Most farmers rely on pesticides and it's well-known that they produce mixed results. What if a farmer is able to get real-time updates on how much and when to protect crops, specific inputs on increasing crop yield, reduction of water consumption? A smart farmer would clearly see an economic benefit. There are companies leading such technologies, which use a mobile app on the farmer's phone to leverage an IoT-based network to monitor the movements of pest populations as well as to monitor crop quality.

Closer home, at TCS we have built a low-cost digital collar for cows in India. This enables a humble farmer to reduce the calving interval period of a cow and also to better monitor the health of our cows and ultimately improve earning capacity by almost ₹ 5,000 a month. Meanwhile, [here is the text] of a short video of an incredible dairy farm in England.

*It may look like just another farm building but this five-star accommodation provides room service, provides regular healthy and nutritional meals. There's constant attention in housekeeping and there's even an opportunity for massive internal personal grooming. Perhaps the most remarkable feature of the University of Nottingham state-of-the-art Dairy Centre is that it allows the cows to make the decision as to when and how often they want to be milked. This is a major departure from*

*what traditional milking machine methods for the cows were forced to fit into the farm routine; we find the cows are far more contented in the system. There's no pressure on them. In the old system, we would get them up twice a day and force them into a collecting yard ready and they would have to wait there until we would take them out and milk them. In this system there's no pressure on them and they can just choose when they want to be milked. Some are milked at 2 or 3 in the morning, some will go in the afternoon and they can milk up to six times a day. It averages about three times a day, but they can choose exactly when they like.*

*The University of Nottingham Dairy Centre is part of a working farm. So, research is designed to find practical and applicable solutions to the problems of modern farming. Nottingham University's farm objective is really threefold. One is to provide an educational experience for students, secondly to provide an environment for research and because that costs money and it is very expensive to run research programmes and very expensive to provide education. So we want the farm to make us some money commercially that will pay back into education and research.*

*A robotic milking machine may sound like something from a science fiction story, but the results in terms of increased milk yield and improved animal welfare are impressive. The unit has seen increases in the milking of up to 10 per cent in some animals, and mastitis, one of the major health problems of dairy herds, has been significantly reduced. We were getting about four cases of mastitis a week. We're now getting much less. It may only be two a month. It has improved the mastitis situation tremendously.*

*The university is also conducting research into the nutrition of the milk. Producers want milk with high protein content for cheese manufacture and with less saturated butter fats to provide a healthier product. By providing a mix of foods and monitoring portions, the researchers are aiming to improve the end quality of the milk and the general well-being of the cows. Stockmen are still employed but because of loss of the mundane and time-consuming work of dairy farming it is now handled by a robotic system. They have more time to spend with the animals observing them and looking after their welfare. So it's a robotic system for the future of*

*the dairy farm. Robots fit in very nicely within the university's research environment and its ethos of going forward and developing things for the future rather than just taking the best of current technology which would have been the soft. We wanted to be part of the development process and we felt that robotics was the next step.*

What we saw was a very powerful use of technology in the service of animals. The Fourth Industrial Revolution is very much about foregrounding ethics, ahimsa and dharma.

Now, what is the importance of India? We have so far dwelt upon four major technologies of the Fourth Industrial Revolution: Artificial Intelligence, Nano and Biotechnologies, 3D printing and The Internet of Things. So now we all know a little bit about this revolution and need to ask ourselves how this will affect India and will this affect us in the same way as it does the more advanced nations. Clearly the answer is no. The mobile phone impacted India in more far-reaching ways than it did in those nations. Similarly, we have an opportunity to leapfrog on the back of the Fourth Industrial Revolution to create an accelerated and differentiated growth trajectory for itself. With the population of more than 1.3 billion predicted to become the world's youngest population by 2022, I believe the smart thing to do is to position ourselves advantageously for the new things to come.

Historically, when I look at 1600 when India contributed more than 22 per cent of the world's GDP, which plummeted to about four per cent in 1919 before economic reforms brought it up to about 6.8 per cent... At the time of the first industrial revolution with the British Empire's mechanization of the textile industry, India a British colony, paid a steep price as millions of weavers were replaced by machines. India has remained behind the curve during the second revolution as well. It did much better with the third revolution and should do even better in the fourth.

Given that many industries and many Indians residing across the world are driving this revolution and the fact that we have

tremendous software expertise means that we can exploit these to solve developmental challenges. Currently the Fourth Industrial Revolution may be the last thing on the minds of most Indians, because we have other more important issues that we are grappling with: bridging the infrastructure gap, enabling electricity and sanitation in our villages, bridging the digital divide and improving last mile connectivity across our rural areas. We are also working to harness human capital for the skill development of one million youth who are joining the workforce every month. The government over the past two years has been in mission mode with the launch of ambitious initiatives like Make in India, Digital India, Scale India, Smart Cities and Startup India. While such initiatives get under way and begin to solve the big challenges namely, education, health, skilling, housing and basic amenities like electricity, it is wise to keep a sharp eye on future technologies and adopt those that could significantly accelerate the impact. When we talk about electricity for all, this is on top of the national agenda. The 2011 census revealed that 43 per cent of rural households still use kerosene to light their houses. On the other hand, in urban slums and poor fringe areas, transmission losses and stealing of electricity are common. Hence, we need to do three things. We need to produce more electricity, make it more affordable, and distribute it more efficiently.

The IoT offers some solutions. We receive abundant sunshine as a country. Our focus is on solar and when you think of solar you think of large solar farms connected to a grid to produce in bulk. Today IoT is disrupting and making possible what is called distributed energy. This comprises a range of small and mobile modular devices designed to provide electricity locally, such as solar panels on a roof or a small wind turbine in a consumer's backyard. This energy production gets more localized and perhaps more affordable. Further, IoT-enabled sensor networks allow you to manage the generation source in real time. In fact, some utility companies are beginning to talk about an internet of energy per millions of consumers; small businesses are able to create their energy production and consumption online.

Then there is bio-economy, an opportunity for India to align with a trend towards bio-based economy. You forget that petroleum-based chemicals are relatively new in the history of mankind dating back to only 150 years or less. And now fortunately thanks to advances in biology and chemistry it has become increasingly possible to have green chemistry to make food, fuel and materials more organic renewable materials. For example, when we consider the question of energy, the town of Maabjerg in Denmark has the world's largest biogas plant. It receives cow dung as slurry from dairy farmers through pipelines from as far as 60 kilometres. The plant processes half-a-million tonnes of dung to produce a million megawatt hours of energy in addition to fertilizers and renewable fibres. Another powerful trend in the bio-based economy is driven by what we now call synthetic biology. Scientists in Chennai are producing vanillin, the essence of vanilla, and santillan the key ingredient in sandalwood, from sugar by using specially modified microbes and sugar fermenters. Scientists elsewhere are producing dyes and colouring agents in a similar manner. If you recall, Gandhiji's Champaran satyagraha was provoked by a dramatic fall in the price of indigo due to the German discovery of synthetic dyes. That was another landmark in the first industrial revolution.

The healthcare coexistence of India and Bharat presents fertile ground for technological innovation in healthcare. We have many world-class hospitals with world-class medical equipment in our cities. At the same time there is a rural population that would require access to the same kind of medical attention, but at one-fourth the cost. For some time now countries like India have been driving frugal innovation and low-cost medical devices. Companies like GE have been quick to recognize the market opportunity and the outcomes include [inventions ranging from] a handheld ultrasound device that can be easily carried to the remotest places to the frugal lullaby plus infant warmer and much more. In fact, they say that the low-cost healthcare equipment sector is now estimated to be worth over eight billion dollars. It's not just companies but universities like MIT that

are gripped by the problem realizing that one in five deaths among pregnant woman was traced back to anaemia. MIT graduate Myshkin Ingawale created Touch Hub which has a probe into which the finger is inserted. When light emitting diodes in the probe shine light through the nail, the photo diode at the other end flips the absorption patterns to produce an instant reading of the volume of hemoglobin in the patient's blood and it can diagnose anaemia in less than a minute.

Over 700 million people now owning mobiles in India are aware today. Technologies are available that allow stethoscopes to connect to your mobile phone enabling doctors to monitor the hearts of patients remotely. Tomorrow nanotechnologies might make possible for health workers to prepare or to place contaminated water into transparent bottles which, when placed in direct sunlight, could disinfect the water and help prevent water-borne diseases like cholera, dysentery and polio.

The Indian government needs to mainstream such technologies, focussing on investing in them. It also needs to incentivize innovation in healthcare through the Startup India programme. The government has also launched the Smart Cities mission to develop hundred cities all over the country. Twenty cities including Chennai have been selected in the first round, and the goal of building a smart city is to improve the quality of life by using technology to improve the efficiency of services and meet residents' needs. Through the use of real-time systems and sensors data is collected from citizens and objects, and processed in real time. The information and knowledge gathered are keys to tackling inefficiency. Sensors placed across a city along with GPS would enable smoother traffic; in the utility sector usage analysis and prediction results in smart network with substantial resource savings. A turbine in a power plant with real-time sensing of the vital parameters and managing remotely from a centralized location provides for efficient operation and proactive actions from the utility.

Smart cities may seem somewhat overpowering to most people my age. However, consider the fact that mean age in India will be 29 years in 2022. A large number of Indians will be digital natives who by definition are 15- to 20-year-olds with five more years of online experience. These are the young people who never go to a railway station or a bus terminal or even a cinema hall to book a ticket. It's all done through a smartphone. Their online shopping experience tells them what their peers are buying and reading. The social networks tell them what insurance to buy or what product was a disaster. They do their banking with a few clicks of a button. The Fourth Industrial Revolution will help India meet the expectations of internet-savvy young Indians.

But all of these come with a number of challenges and just as every coin has two sides, there is always another side to the various advantages offered by the industrial revolution. Let's touch upon two or three of these. First, the labour market. The biggest concern is that the labour market will undergo a dramatic change. It's certainly a loss of some kind of jobs and the creation of new types of jobs. For example, the e-commerce industry is a threat to retail malls. But it spurred the need for delivery staff. Yet another model is that of e-commerce retailer Amazon.com. It was one of the first e-tailers to experiment with the use of KIV robots to move boxes around its fulfillment centres and found the robots so useful that it bought the company that made them. Amazon deployed 1,000 KIV robots to work in warehouses that took 10,000 workers. At last count, Amazon had 30,000 robots working for it. To put that in context, Amazon has only 90,000 humans working in its warehouses. As of today, one in every four full-time Amazon warehouse workers is a robot. What does this mean for young people seeking jobs? The only job security will be the ability to learn new skills.

I was recently reading an article by John Chambers, the chairman of Cisco, who said that about 40 per cent of companies that exist today will cease to be relevant, and replacing humans with robots

in manufacturing is a trend that we cannot stop or avoid, but we can better be prepared by becoming open to learning new skills. As someone who is deeply involved in skill development, I am always concerned about bringing awareness of this phenomenon amongst youth, more importantly their parents. It's for this reason that Tata Strive, a skill development CSR initiative of the Tata group, was set up with a 40 per cent focus on life skills to build open-mindedness and positive mindset required for the 21st century. One of the initiatives we have taken up in government is to move the unorganized workforce to the organized workforce through what we call recognition of prior learning, certifying them, and linking the wages to the certificate meaningfully. Some 93 per cent of our workforce is unorganized.

The World Economic Forum (WEF) predicts that all these job losses will be offset by employment in other areas. During the recently concluded Davos conference, it estimated that 7.1 million jobs could be lost through redundancy, automation or disintermediation while the creation of 2.1 million new jobs, mainly in the more specialized areas such as computing, maths, architecture and engineering, could partially offset some of the losses. There certainly would be an increase in demand for high-skill jobs. Driverless cars for instance will obviate the need for drivers, but it would require a lot of smart coders who to make such cars ply the roads safely in different parts of the world.

With these challenges the government will need to balance its capitalist and socialist agendas. India would need to look at this issue both from a policy perspective as well as from a social perspective keeping in mind the balance between improvements brought about by the Fourth Industrial Revolution as well as the wants and needs of its citizens. The most important challenge is cyber security. The second industrial revolution saw the ability to mass-produce violence. Technologies of destruction evolved rapidly from the Colt revolver to the machine gun and eventually to atom and hydrogen bombs in less than three human generations. In this revolution of digital automation, a major concern is cyber security. The use of sensors, interconnected systems,

data monitoring across internet networks, spanning geographies and sometimes nations, poses a very high security risk both for the data flowing through it and the systems connected to its networks. You may all be aware of the Stuxnet [a malicious computer worm] attack on four nuclear sites in Iran. This virus in the operating system of the nuclear centrifuges made them spin faster, decelerating and accelerating beyond normal limits, leading them to fail. It took more than a year to detect this virus. Scientists first blamed faulty equipment manufacturing for the failures in the centrifuge; imagine the disastrous consequences of such a virus to a nuclear reactor. Criminal gangs or even rogue competing companies could potentially steal from manufacturing companies extracting millions of dollars through what is being called cryptolocker-style attacks.

Computer systems do not manage just data, but also physical systems. Compromises such as a virus encrypting critical information make the system no longer available, and this could potentially stop production. The company receives a threat demanding large sums of money, which when given, will decrypt information. Suppose, for example, this information was critical to manufacture an innovative product, it could fetch the company millions of dollars before others replicate the same. Such an attack would delay the production potentially running the company out of business. Ransomware as it is commonly known is being proliferated across the world and just a few months ago in India it was reported that hackers seized control of computers at three banks and a pharmaceutical company, then demanded a ransom in bitcoins for the decryption keys to unfreeze them. A cyber-attack could be a physical risk by which an attacker can control part of the entire system of the victim. It could be a data error scare, stealth of confidential data or a vendor security risk which becomes a vector for a cyber-attack. To address these, first there is a need for threat intelligence that indicates who is the potential attacker. Then we'll need threat detection to analyze how real the threat is, and finally we need to find ways to prevent the threat.

Companies are creating a holistic approach in response and this is a fast-developing field. I see a lot of potential and opportunities for entrepreneurs, scientists, technologists to collaborate. In particular India with millions of highly qualified software engineers has the ability to identify exploitative ways that malicious users might use and help protect the world against them through the design of appropriate offensives.

The third, the last one, is one of sustainability. With the advent of increased digitization in our lives, the consumption of energy is going to increase multifold with more inclusive measures. Those currently not digitally included will mainstream, putting further pressure on our energy resources. The alternative energy industry will mature, and fossil, fuel, solar and wind energy will drive down dependency on oil. This would alter the global economic power balance. Already the oil-rich countries in the Middle East are looking to tighten the liberal services offered to citizens and have put curbs on household water consumption.

Even back then, Nani Palkhivala had called for a socially responsible business to be a pillar for the new India. Businesses need to engage in good sustainable practices and the move towards this has already begun. Recently, the head of the King Commission on Corporate Affairs in South Africa, the South African legal luminary Mervyn King, visited Mumbai. He has published path-breaking guidelines on corporate governance known as ‘King Reports’ The latest reports put forth that in principle, governance strategy and sustainability are inseparable. Good business practice requires that economic, social and environmental issues be included in corporate strategy, management reporting and assurance throughout the year in the same way as financial matters are dealt with. While this was tabled in 2010, it is forward-looking and I believe that all companies need to take an integrated approach to reporting, which provides a reliable comprehensive and holistic overview of the company from both a financial and non-financial perspective. The company should be able

to outline the impact of that business and all three spheres in which it operates – economic, social and environmental, also known as the triple bottom line.

Now what should academia do with all these, the opportunities, challenges, technologies and the examples I gave? We need new kind of financial experts, people who understand broader aspects of social and environmental context. As new academic subjects such as environmental engineering and a demand for more of such experts grows, young people will begin to take up these new areas of study. Universities will need to develop new futuristic courses in these areas, and all these courses will necessarily have to include high components of technology because by then technology will become integral to every branch of study. Therefore, industry and academia need to come forward to design courses that would feed into the demand in the next 10, 20 or 30 years. These are only the beginnings of setting up a national skills qualification framework for this country which defines various levels, capabilities and competencies, irrespective of domain. Soon, we will necessarily have to link it to the frameworks of other countries because people will seamlessly move between countries for work. This may call for a global digital qualifications identity, which means all your qualifications, skills and course credits right from school through college, get stored electronically enabling worldwide access.

If India aspires to be the talent capital of the world, given the potential of its young population, we will have a lot of work ahead for our universities and colleges to begin to align with these future trends. More importantly it will have to be nimble and responsive to change. They must develop mechanisms to update curriculum quickly, introduce new areas of emerging importance quickly. The current model of academia and industry working in silos will fail us badly.

What about the role of global governments? Earlier I addressed the need for the Indian government to integrate Fourth Industrial

Revolution technologies in governance, planning and strategy. On a larger scale, nations need to collaborate and promote new secure technologies. As things stand today the global regulation of cyber-security is in its infancy. The internet is loosely regulated with technical standards set by the World Wide Web Consortium or w3c. There are still questions around open internet and privacy of organizations as well as individuals.

Edward Snowden's revelations showed that there are back doors present in most internet services and cloud servers. The good part of it is that people are getting more involved in policy discussions and governments are listening to them. Remember the debate on net neutrality which was recently resolved by TRAI after taking inputs from everyone including the common citizen? India has initiated dialogue on cyber security with the US, UK, Germany, EU, France, South Korea and Russia, as well as Japan and Australia where views have been exchanged on national cyber security policy sharing of critical information, capacity building, research and development and other issues. Cyber security is becoming an important element of foreign policy due to its relevance to national security, public safety and economic development.

Next is the need for standards because potentially we will have 50 billion numbers of connected products including anything from smart watches to intelligent thermostats. All are capable of interacting with other devices and systems. However, they have been created using different technologies and platforms and thus there is not a common standard for them to speak the same language. What this means is that if a component comes from a vendor in a smart factory and a robot is unable to read the tag of the component as it has a different frequency or interface, all your operations come to a halt. There is a huge opportunity for integration and standardization in the future. These are global issues which cannot be solved overnight; there needs to be discussion involving all stakeholders to help resolve them.

Collective global actions are an imperative. Nations across the world need to come to the table to resolve issues through discussion on critical aspects, such as governance for IoT given the energy limitations of the future and the enormous processing capability that's required for low-power devices. Open standards and frameworks for interoperability of devices need to be created. The free market should be able to decide whether to pursue an open standard or closed standard IoT process. There are several issues that need to be considered such as global surveillance privacy protection of citizens in light of surveillance by governments in the name of counterterrorism treaties or agreements; sharing and deployment of best practices for cyber security, investing in threat information sharing with partners; establishing a legal framework for dealing with issues regarding territorial jurisdiction, data ownership, data preservation, protection and privacy; addressing the problem of existing cyber laws that do not carry enforcement provisions. Further, cybernetics should be mandatory in all schools worldwide. Issues such as privacy and secure ways of participating on social media, etc., need to be inculcated right from early education.

The role of education and skill development cannot be sufficiently emphasized. In fact, I cannot emphasize enough how important it is for us to make changes in our education system now. We will be doing a disservice to our youth if we do not provide them the knowledge, life skills and technical skills to become productive citizens of India and indeed the world. You must provide them with the best opportunities that the future will offer. Seeing several young people in the audience, I must add that you will be empowered to learn and self-learn many things. Massive open online courses commonly known as MOOCs have become a disruptive innovation change in learning. It has 35 million students all over the world. The Fourth Industrial Revolution will need you to be focussed on learning fluidity. As I mentioned earlier the job which you are doing today may get automated 10 years down the line and hence the key here is to be flexible or fluid enough so that you are able to move across jobs and disciplines.

That reminds me of Stephen Covey's *Seven Habits of Highly Effective People*. The seventh habit is to continuously keep on improving yourself and sharpening the saw. For parents and many of you in the audience today, I urge you to be open to new kinds of career paths which may take your child through jobs in different industries, and, as is the trend today, even into starting businesses of their own. Today's jobs require interdisciplinary skills and businesses are realizing that the best innovation happens, not when a bunch of scientists come together, but when people from business, the sciences, social sciences, humanities, design and art come together bringing exciting new dimensions to the outcome.

So as I come to the conclusion, thus far I have spoken about what the Fourth Industrial Revolution is, how it will impact our everyday lives, why it is extremely important for India to leapfrog on these technologies to meet the development agenda, how this could guide governments and businesses to plan for the future through policies and strategies, how governance and standards of corporates of nations and indeed global bodies will be key to ensure that technologies are used wisely and fairly because there is a flip side that affects jobs and labour security and sustainability of this planet. Now while the last three revolutions have taken their own time to peak and mainstream, this may not be the case of the Fourth Industrial Revolution.

One may argue that it took more than half-a-century since James Watt invented the steam engine for it to become the core of industrial production. Similarly, the first computer ENIAC was developed during the 1940s, but the real application of computers and technology only started 20, 30 years later. However, the time taken for mass adoption is becoming shorter. Seven years ago, before the iPhone was launched, no one knew about apps or a touchscreen smartphone, yet today almost everyone has a touchscreen smartphone full of apps and we learn to use them seamlessly. Going forward, constantly getting re-skilled will be an imperative. As the government will do its part, the

onus of keeping up lies equally with us. Change can be exciting if you all adopt the right attitude.

Nani Palkhivala lived during the third revolution, but his values are as relevant today as they were then. All individuals transcending social and class boundaries merited the same basic human respect for Mr Palkhivala. He truly believed in equity for all, that progress should ensure the well-being of all people. Mr Palkhivala daily followed the dictum that the sage of Kanchi, fondly referred to as the Paramacharya, used to talk about: “*Paro Upakara Itam Sariram*” (This body is meant in the service of others). It is evident to all of us here the deep understanding of our culture, our nation, and our society. The Fourth Industrial Revolution like all other revolutions before reflects man’s indomitable quest to explore what lies beyond to invent new things with new technologies to search for new knowledge.

While we must salute and celebrate the successive generations of people across the world who have made this planet a more exciting, comfortable place to live in, you must reflect upon, as Nani would have liked us to do, on what we pass on to the next generation.

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# Putting India on the Fast Track

Suresh Prabhu

June 24, 2017

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I was reminiscing about the days, just after the Union Budget, when each and every person would want to listen to Mr Palkhivala's comments. Those days not many experts were available to comment on the budget. I lived in Mumbai and Mr Palkhivala would make his speech, on the first day for the general public, the following day for chartered accountants. He would analyse the Finance Bill, analyse the proposed amendments to the Income Tax Act without even a single paper in front of him. His commentary was obviously penetrating, finding holes in the arguments the government would have made when presenting the budget. All of that was not to criticize. It was essentially to find out how you can do things better and faster.

I remember his other contribution and I don't know which one is better. I was so enamoured by his arguments about which is more important, the rights of the state or the citizen? He inspired me. I am a lawyer – of course, I cannot be like Mr Palkhivala – but I am trying to do something that Mr Palkhivala did, that is to protect the common citizens' rights. I also did my CA but one can only practice

one thing. The Emergency was a black chapter in the history of our democracy so our topic today is one that Mr Palkhivala protected vehemently: human rights and property rights.

Talking about putting India on the fast track is very appropriate when we think about Nani Palkhivala and today's context. When we decided that we wanted to put India on the fast track, people like Palkhivala were of the strong opinion that we must allow the entrepreneurship of the country to grow, the state must play an enabling role and entrepreneurs will develop India. Unfortunately at that time, the argument that prevailed was that the state must do everything and that took us to the belief that the state knows everything and will decide everything that is good for citizens; the state took over all the responsibilities and never told the citizens what their duties were and that became a sort of aberration in the course of India's economic development. That course correction is what we are trying to do now.

I remember a fine point these scholars make and that is, why should government engage in development, it should be given to institutions like the Ramakrishna Mission because they can, they have the heart to do it. The government has the power but [those kind of institutions] have the heart. If you force something on a bureaucracy and you ask someone who is motivated to do it, who will do a better job? That's what he always used to say. Critics of the school of thought that believed entrepreneurship can do everything and the state should only be an enabler said that the poor would get very badly affected if the state did not act for them. Now that there is enough empirical evidence available, in countries where the state wants to do everything have they succeeded in removing poverty? I think allowing the state to be an enabler even as the helping hand of state is available to those who need it the most is the ideal situation.

In today's context, putting India on the fast track is necessary not because we want to compete with some other country but to ensure human dignity. If that has to be ensured then inevitably economic progress has to happen. Unless we have enough resources we cannot

deploy those resources where it will really help the most needy and the most vulnerable, the poorest of the country. And to create the resources we obviously need an economic policy that will allow entrepreneurship which will create resources which will create wealth that can be then put into the right resources. Mr Palkhivala talked about how to create resources and how to deploy them. That's why I gave the example of the Ramakrishna Mission because they can do the deployment part better. Today we must ensure that the best of both models that allows us to grow be allowed to become reality. The first one is entrepreneurship.

There is no denying the fact that India's growth story is essentially because of entrepreneurship. If we compare ourselves with China: its almost 10-billion dollar economy is almost five times India's GDP, five-six times India's per capita income. All that happened because of huge investment by the state and now they are probably worried that it has taken them this far but not beyond. Now they have to see that capital deployment happens in a more efficient manner through private sector participation.

The Indian growth story is the other way round. The state while trying to do too many things, the emotional things, has not succeeded in realizing the objectives. In the old days we saw the public sector commanding great heights. Now we need to revisit all that. Even Air India is a good example of the heights it was at when once run by J.R.D. Tata; after the government taking over we have created a problem of ₹ 40,000 crore in debt.

India has grown at a rapid rate, thanks to the private sector. That has to grow faster. We need to remove all the hurdles that come in the way of business and that's why ease of doing business. We made that a priority in Prime Minister Narendra Modi's time to ensure that all the hurdles, all the obstacles that are there in the way of business be removed. The enabling role will fall in place by removing hurdles to make sure that entrepreneurship blossoms to its full potential.

Startup is a key word now because if you want to really allow entrepreneurship to be born, it will be in the minds of people, in the digital world. They were all born in small spaces: Google probably in a garage, Facebook in a college dormitory. All this explains that we don't need to invest a huge amount of money to create new businesses but we need to invest in entrepreneurs and allow them to see their ideas to fruition. That means we must encourage startups equally for everyone. We need to develop an ecosystem like in the US for startups to grow, that's what we are trying to do.

The third element is the job market which has changed dramatically. Jobs in government will no longer be available. Just imagine, there was a time when people used to feel secure with getting a job in the post office because post offices are available in the all villages, which meant that the business would always grow since people are always sending letters to each other. But jobs in the post office are not growing anymore, the courier service is growing, jobs in the courier service are growing faster. So just imagine the change in the job profile: the government providing a job in the same service provided by the courier. They are now growing but post office jobs are not. Take another example. If you wanted to be an airhostess or a pilot, the only options available were Air India and Indian Airlines but now there are jobs in the airlines sector, there will be jobs in Jet Airways and so many others. There are jobs in the police force because security is becoming important, but they may not be growing as fast as earlier. That does not mean jobs in the security guard business are not growing, they are growing faster. Earlier, Doordarshan was the only channel, now jobs in the entertainment business are growing. This means the creation of jobs has happened in a different way.

What does all this mean? It means that opportunities in the job market are changing rapidly; jobs are no longer created by state intervention but in a deregulated manner. This has happened in most countries. It is one of the reasons people were trying to support President Trump because he said he would provide jobs. He said he would get back the

jobs that had gone to countries like China and India. I think what happened in the US, what happened in other countries, is showing us what sort of glitches can come up in the future as regards jobs, and how job profiles will change.

India has to change according to that. Therefore we need to ensure that each and every person in the country will be able to now do a job of his choice, something that he is good at, something to which he can contribute his ideas and mind, and be part of an ecosystem he likes. Earlier the system was that I set up a big business, I allocate a job and I create a job and then I try to fill a vacancy but just imagine the new scenario that is emerging in which you create opportunity because you identify an opportunity that exists because of the economy that is growing and then fill up that void by creating a working model. To develop this new system, we need scale development, developing every individual to realise the potential he has. This is available across the country.

We run an NGO called Manav Sagar Vikas Sansthan started two decades ago realizing what will happen when job profiles change. There are more women than men because men migrated in search of jobs. They have daughters, mothers, and wives. They are given an aptitude test. We have more than one lakh women, and at least 40-50 per cent have now become self-employed in rural areas. Of course, they don't earn any fancy amount. Our target was something between ₹ 4,000 and ₹ 5,000 a month which is supplementary income earned by a woman sitting in her own home because in rural areas it is very difficult for women to leave their homes and find jobs somewhere else. In some areas, there is no system of locking the house. So we decided to develop this model.

I am putting India on the fast track. There is a BRICS report written for Goldman Sachs in which the author said that the four countries driving growth in the future are Brazil, Russia, India and China. South Africa was added later apparently to make it politically correct. Later the author joined an investment bank for which she wrote another

report in which she said that if all Indian women get minimum wage India's GDP could rise by 1-2 per cent. We are making all these efforts for India's GDP to grow faster. This is definitely do-able. Just imagine each and every person becoming gainfully employed in India. How much that would add to India's growth. More importantly, that's been the whole objective of economic growth, and that's what Mr Palkhivala's point always used to be: is growth just to add numbers or add more to the GDP? Or is it something for human development, to bring about a transformation [in the life of] each and every person in this country? If that has to happen then just creating economic opportunities for a few is not enough; making income available to each and every citizen of India, particularly women, is important.

Going back to what I said, many women told me that after earning 5,000 rupees the husband now is afraid of beating his wife because he realizes she is not going to come and cook for him; now that she has her own income probably he will have to cook for her. This is a great change that has happened and will ensure that women start earning more. This is not something only for GDP but actually adds to human dignity. It used to be Mr Palkhivala's overriding argument that putting India on the fast track is not just to increase GDP numbers but to make sure that Indian citizens, particularly women and those who have been deprived of economic benefit for centuries, get the benefit of so-called increased growth. Of course he didn't use the phrase 'fast track', that became fashionable later. So, putting India on the fast track would really mean that human development and economic growth go hand in hand.

What then is the role of the state? In fact the state will have a bigger role than it has played so far. It must play that role effectively, creating infrastructure for India to make governance work, to see that safety, security, law and order are properly maintained, ensuring we create a proper regulatory system. All of that is necessary and all of that can only be done by the state. In order to put India on the fast track, we must invest more in infrastructure; without infrastructure

entrepreneurship cannot flourish. Can we say only startups are necessary and expect the entrepreneur to come and make an investment when the railway line is 500 km away? The state has to do certain things. Unfortunately, in the course of the last decade we have completely ignored this core function of the state so we must make sure we do this properly. Investment in the railways in the last two-three decades has declined to such an extent that the railways are losing the market share which was once upon a time 90 per cent. Lack of investment meant not only loss of total share but some part of the capacity of the railways has been over-utilised to an extent that it is on the verge of breakdown. Some 16 per cent of the railway network handles more than 60 per cent of the traffic. Everyone knows that we need a break, even the mind, the body need a break. A machine too needs a break so that we can maintain it. We are not able to maintain railway tracks, we are unable to replace what needs to be replaced. We decided to do this correctly. In the course of the last two-and-a-half years we have decided to invest ₹ 3,75,000 crore in the railways. This is not something that is coming out of nothing, I presented a white paper to Parliament when I became minister. Everybody was asking me what I would do as railway minister. I see many young people sitting at the back. One day you will be answering this question. When I was young my school teachers would ask what I would do if I were prime minister or president for a day.

First of all I would always think why only for one day? We would give fantastic answers, we'll do this, we'll do that. So as railway minister I would say I will first identify problems and lay them out before the country. I did that with the white paper. Then I presented two budgets, the third was by the finance minister. But everything was based on the problems mentioned in the white paper: 16 per cent capacity handling 60 per cent traffic, we have to create capacity, how to create capacity, where there are two lines put a third line, where there is a single line, make a second line. In the last two-and-a-half years, 16,500 kilometres of lines were sanctioned as against approximately

20,000 in the last few decades. According to my budget, we plan to invest ₹ 8,50,000 crore in the next five years. Each and everything mentioned in the budget is already under implementation or fully implemented. Even today only 42 per cent of the railway network is electrified; it will double in the next five years.

We will create capacity where there is a problem. A cardiologist will always say there is a problem in the heart but a good cardiologist will never say there is a problem, he will identify where the problem is and prescribe whatever medicine is necessary. You deal with what is causing the problem, not the heart generally, then you will be able to take care of it. That's how we decided we would make the right investment and that is what we are doing covering 16,500 km of doubling, tripling which will ease traffic and create more capacity including a dedicated freight corridor. When I took over as minister there was virtually nothing given as contract. Now we are giving contracts and we hope to complete the work by 2019.

We set up a proper timetable so that both freight trains and passenger trains can run in an optimal fashion. For passenger trains, only one track is now fully electrified, so we decided to manufacture two major diesel electric locomotives. They will actually start manufacturing in the next few months. This means trains can run at a much faster speed. We have decided to change our entire rolling stock of 40,000 coaches which is almost 90 per cent. This will be over the next five years. We are trying to increase maximum speed to 200 km on the Delhi-Mumbai and Delhi-Kolkata sectors, investing ₹ 18,000 crore on tracks. Although initially many people questioned what we were doing, now they have realized it is the right way. We are trying to transform the railways over the next five years through infrastructure investment. It's not just ease of doing business but speed of doing business, and doing it cheaper.

The train continues to be one of the most preferred ways of transportation globally for many reasons: it has the least emission, it has speed, it is a public carrier so it can take people from one place to

another and does all this keeping in mind a sustainable environment. Railways, roads and other infrastructure investments will play a key role in putting India on the fast track. I commissioned a report by the National Council for Applied Economic Research (NCAER) which will be released very soon showing how the railways alone have created and will create a few crore jobs because we are making this investment. One rupee invested in the railways will have a spinoff benefit multiplied by six and that is what will help the economy as well. So, while we create infrastructure investment, that itself will create jobs leading to economic activity and because we are creating infrastructure that becomes an enabler, it becomes a launching pad for more economic activity. This is what we really need to do to make the railways profitable.

I will give a very good example of how State governments should be enablers and not just participants. Take the power sector. Before 1948, the power sector used to be in private hands – generation, transmission, distribution. Even railways was in the private sector in 1948 when it was nationalized. We created integrated entities, vertical entities; generation, transmission, distribution would be handled by one company and it would be called the ‘State electricity board’. After some time we realized that it is my own company, I can use it for whatever purpose I want so I’ll start giving free power. I used to always tell people that you must give free power, there will be no problem but first develop a technology to generate free power. If you can generate free power you can give free power, what is the problem, but if you don’t have the technology and you are giving free power then what is going to happen? This is what happened. The State electricity boards became bankrupt.

You remember the good old days or the bad old days when power cuts were the order of the day? When I became power minister I decided I must rectify the situation. One obvious way was to invest, but who would invest in the power sector? The State electricity boards had no money, no bank was willing to lend, and if you were to put equity into

power projects, you needed three-four times the amount as debt. So what was to be done? And we had nationalized the power business. In Marathi there is a saying that when a child is hungry and goes to the mother, the mother says there's nothing to eat and when the child asks the father, the father says that if my child goes and begs outside, my family dignity will be compromised so he doesn't allow him to beg. So we say, look at the plight of the child: the mother doesn't give him food and the father doesn't allow him to beg. What can the child do? That was our situation: we couldn't give power but we would not allow you to produce power because the business was nationalized.

I said we will change the rule by doing a simple thing. We set out a law, the Electricity Act 2003, allowing private sector participation. In the last 10 years, power generation has grown three-four times; now there is virtually a power surplus in India. So what is the role of the government? The role of the state is to enable the creation of capacity. It doesn't mean one solution for all, it doesn't mean privatize everything, that is not the right way. Nor does it mean the government is the only agency that can do it. We must have a proper balance. We must understand what the best solution is and we must find it.

Some of my colleagues said why don't you privatize NTPC (formerly National Thermal Power Corporation Ltd). But applying the same policy for everything is not a good idea and following an ideology blindly is wrong.

Talking about ideology, I used to tell my friends that power is generated not by ideology but by technology. I cannot say I am a leftist so my power should work more, my turbine should work faster or I am a liberal like Mr Palhkivala so it should not go down. Issues like power should be above ideology. To put India on the fast track too, we must follow only one ideology and that is how it will benefit the poorest of the poor, the common people of the country, how it will remove disparity, how we can make sure that every citizen lives in dignity and in order to do that see what policies will work for them and implement them. The policies that will work for them are the

policies that will ensure that people themselves are empowered, they are able to realize their own potential. The government's role will be to facilitate that and that is what we should try to do. If you look at the broad theme of Prime Minister Narendra Modi's governance model, it is the same: that we must reduce the burden, the hurdles that people are facing, we must have ease of doing business and ensure that the resources available are given to all to enable them to become entrepreneurs through the Mudra Yojana. Empowerment is the key word for ensuring fast growth in India. I think that is the model even Mr Nani Palkhivala would advocate: the state must do everything that the state has to do but allow the citizens of India to develop their own potential. Marrying these two policies is what will enable us to put India on the fast track.

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# **Decoding the Reserve Bank of India and Government of India Relationship**

**Indira Rajaraman**

March 23, 2019

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It is indeed a privilege for me to be delivering the Palkhivala Memorial Lecture today. It's not my first time. I've also delivered a Palkhivala Memorial Lecture under the auspices of the Mumbai Palkhivala Foundation. I was a huge admirer of his. I did not know him personally but I had the privilege of listening to him deliver one of his post-budget speeches in Bangalore in March 1982. I was at that time teaching in IIM-Bangalore. IIM at the time hadn't moved from the city campus to its present campus on Bannerghatta Road. So, I was able to go across to the Vidhana Soudha which is where the Palkhivala talk was held and, like many millions of his admirers over the years, I was utterly mesmerized by what he said.

If you remember, that was pre-reforms India and Union budgets those days were characterized by a welter of changes. There would be details down to the polyester fibre filament of a specified diameter, tax changes on soaps – distinguishing between toilet soaps and washing soaps – and for someone trained as an economist like me who was used to thinking in terms of monetary policy, fiscal policy and very

aggregative terms, this information, this very item-specific information was impossible to understand or make sense of. Mr Palkhivala made sense of the whole thing. He was brilliant in being able to look at a welter of seemingly unrelated information and seeing a pattern in it. He was able to show us, the audience, how the fiscal policy in those days was essentially driven by industrial lobbies asking for reduction in customs and excise duties on a multitude of things, marked with great specificity to suit their particular interests. He did this all with a sense of humour for which he was well known, he didn't at all sound offensive. He made us all laugh when he said, "The government of India is a friend of the industrialists but I'll tell you whom the government of India most favours – it is accountants. Because by making fiscal policy so very complicated and so complicated for the average taxpayer to understand, it makes them all dependent on accountants." And he said that over the years, the government had enriched accountants immeasurably.

This topic of decoding the relationship between the Reserve Bank of India (RBI) and the Government of India interests us today because of the outbreak of hostilities between the two parties in September-October 2018. The relationship between the two has not always been very amicable. There have been adversarial exchanges of words from time to time, typically having to do with the rate of interest: the government wanting a lower rate of interest to promote growth, the RBI wanting a higher rate of interest so as to contain inflation. Therefore, what happened in 2018 was not new.

The new thing that happened about six months ago commanded the interest of the entire country. One was that the government, for the very first time, invoked Section 7(1) of the RBI Act 1934 under which it could demand consultation with the RBI on certain issues and, consequent upon the consultation, issue directives or directions to the Reserve Bank. What was going on and why had things deteriorated to the point where the government was invoking a section of the RBI Act never invoked before? The second was that there were policy issues

having to with risk weights, Basel Tier 1 capital adequacy requirements which were raised, and so on.

The key difference in terms of the issues raised had to do with the fact that the government was questioning the governance of the RBI. That is, it was not raising particular policy issues, it was questioning the process by which the RBI was arriving at its decisions on various things. So, it was foundational. Today, I will focus on this governance matter raised by the government and deal with it in six segments.

In the first segment, I will look at the relationship between the Central Board of the RBI and the Governor of the RBI because this was something the government raised very specifically, questioning whether the board was playing the role envisioned for it under the RBI Act. The other thing the government raised was whether there was voting on the board on various matters, its role and whether the decisions were taken on the basis of voting.

In that same infamous Section 7(1) whose invocation grabbed everyone's attention, clause 2 leaves us in no doubt that under the RBI Act 1934 as amended to the present day, it is very clear that the wording entrusts the functioning of the Reserve Bank to the Central Board; the Central Board carries the primary responsibility. This is such an important point that I want to read out the wording: "Subject to any such directions, the general superintendence and direction of the affairs and business of the Bank shall be entrusted to a Central Board of Directors which may exercise all powers and do all acts and things which may be exercised or done by the Bank." The wording is unambiguous. The Central Board has the primary responsibility of ensuring the functioning of the RBI. The role of the Governor is set out in clause 3. Let me read that out also: "Save as otherwise provided in regulations made by the Central Board, the Governor and in his absence the Deputy Governor nominated by him in his behalf, shall also have powers of general superintendence and direction of the affairs and the business of the Bank, and may exercise all powers and do all acts and things which may be exercised or done by the

Bank.” That wording also is key because it’s clear that the governor exercises powers that are vested in him by the Central Board. The governor’s powers are derivative, they derive from the board. The Central Board vests these powers in him. From this section, there is complete evidence that when the government was asking whether the Central Board was playing the role assigned to it by the statutes under which the RBI functions, it was entirely within its powers to do so. It was asking that the statutes be respected.

What about voting? In Section 8 of the RBI Act, it is very clear that there is provision for voting. Voting is not mandated. So, there is a difference between what is provided for in the functioning of the RBI and the monetary policy committee which was set up in 2016 by amending the RBI Act. If you remember, the RBI Act was amended to form a monetary policy committee with three internal and three external members, the internal members being the governor, the deputy governor in charge of monetary policy and the executive director in charge of monetary policy. In the amendment which set out the monetary policy committee, voting is mandated. But, in the functioning of the Central Board, voting is made permissible; it is not mandated. And in my four years in the Central Board, no vote was ever taken on any issue.

Further, other sections of the RBI Act say that the governor has a vote but the deputy governors do not have a vote, and the government representatives also do not have a vote. So, the only voting members of the Central Board are the governor of the RBI and the external directors. It says that in the event of a tie, the governor has a casting vote; that is, he can cast a second vote to break the tie. The governor, therefore, can be subordinated to voting and the Central Board members, the external members, can demand that a vote be taken on any issue. They can also demand that a Central Board meeting be convened. So, if you read all these sections together, the power of the Central Board has been laid out very clearly; it has the upper hand. The governor is not the chairman of the board. He presides

over the meetings of the board and is the convener of the meetings. These provisions may surprise us a little because we are so accustomed to thinking that the governor of the RBI represents the RBI. We think of him or her – no her so far – as representing the body in an unquestioned kind of way. I think that (I hope I am not offending the media) the media has also played a role in building up the person of the governor to such a large extent.

I think we have lost sight of the fact that even without the Central Board, the governor represents the professional body of opinion within the RBI. The RBI has very high-powered, intelligent professionals, trained to perform the multiple functions of the RBI; you will be truly astounded to know how many functions the RBI performs. So, I think the person of the governor has been built up a little too much in the public perception and we forget the statutory provision that puts the Central Board at a pivotal place in the running of the RBI and the decisions taken by the RBI.

Let me conclude this segment by saying voting is permissible and if need be, a vote should be taken. However, I want to repeat the point that the governor is not just one vote on the board, he represents the professional body within the RBI, and the decisions taken by it are so varied and some of them so highly technical, that a mere vote where the governor has one vote as against other members of the Central Board who may not be as well informed as he is about the various aspects of the issue would tilt things dangerously away from professional opinion and towards a kind of a numbers game. It's very important that voting should not reduce all decisions of the RBI to a mere numbers game. All I can say is that the government asking if a vote has been taken on certain issues is not in contravention of the RBI Act 1934.

The second segment is about the statutory relationship between the government and the RBI. Under the RBI Act, indeed under the central bank legislation of any country, the government as the sovereign is supreme. It is the government under whose pleasure the

RBI functions. There can be no two opinions on that. And the reason that this is such a standard feature of legislation everywhere is because the first and foremost function of the central bank in every country is issuance of currency. It is the monopoly issuer of currency, it is the only organization in the country which has the power to issue currency. So, if you give monopoly power that strong to an organization, the sovereign handing over that power has to retain the ultimate right to control that organization; so it is with the RBI as well. Under various sections, the government can recall a governor at any time without assigning any cause. I am not a historian of the RBI but I do believe that in the history of the RBI a governor has not actually been terminated like that, but then, it is difficult to distinguish between a voluntary resignation and a termination.

For instance, when Urjit Patel laid down office as governor on December 11, I think he cited personal reasons. We don't know whether he did that voluntarily or whether he was nudged into doing that. Last year, when hostilities broke out between the two parties, one of the precipitating factors was that the government terminated an external director, Nachiket Mor, after a year into his term. The standard term is four years. Once again, according to the statutes, the government is within its powers to do this. It can terminate any director at any time. However, it created ill feeling. Statutes are one thing, but it's important to maintain a good relationship with a very important organization in the country. It was unfortunate that an external director's term was terminated when, just the year before, it had been renewed for a second term. Besides, the information available at the time of his renewal, mainly that he was head of the Gates Foundation in India, was also available, so no new information had come to light as far as we know. This reflects poor judgment on the part of the government; it felt that as the head of the Gates Foundation, there was a possible conflict of interest because he was serving an external organization. This happened on September 20. Overall, a contentious time.

The message here would be that yes, the government has sovereign powers but there has to be mutuality in the relationship between it and the RBI. What do I mean by mutuality? The RBI is the monetary policy agent of the country (when I go into functions you will see that, after the issuance of currency, it is its second most important function). But its monetary policy has to be formulated keeping in mind the fiscal policy of the government. There is a difference between the two. Monetary policy and fiscal policy are the two most important things of a macroeconomic policy and so the RBI should be free to be critical of the government's fiscal policy if it sees fit. There should be mutuality in their relationship. There should not be domination and subordination. Yes, the RBI is subordinate to the government because the government is sovereign in this country but the RBI should feel completely free to question the policies of the government including, for instance, the structuring of GST if need be. Then the RBI is charged with monetary policy to keep price levels stable at four per cent plus or minus two per cent as amended in 2016. But then, the RBI should feel free to question the measurement of inflation which is done by a department of government. If the RBI should feel that inflation is not being properly measured or the Consumer Price Index (CPI) is not properly estimated, they should feel free to estimate the inflation because after all, that is the measure by which the RBI is being judged. So, we need to have a relationship of professional mutual respect between these two very important organizations in the country for governance.

In the third segment I want to talk about the financial relationship between the government and the RBI. The RBI is a totally centralized national bank and you will be surprised to know that nationalization happened as recently as January 1, 1949, but initially when the RBI was set up in 1934, it was a private sector bank. It's surprising to imagine that the central bank was owned by private parties but it was owned by private shareholders. Some private shareholders put up the capital and set up the RBI and they got the monopoly right

to issue currency; therefore, it was nationalized. As a nationalized institution, therefore, it is not profit-making but it does make a profit in the sense of excess of income over expenditure and its profit in principle is payable every year in full to the Government of India as a dividend. The Central Board, however, did choose not to pay the entire dividend to the government but to retain a portion of it and put it in reserves which is what the RBI has done over the years. This parking of unpaid dividend reserves was one of the principal policy issues raised last year when hostilities broke out between RBI and GoI. The government said that those reserves are dividends withheld in the past; hand it over to us now. The RBI was initially unwilling to do that and that was the big policy issue raised last year.

Everyone knows what happened after the November 19 meeting when tempers had to be cooled to bring the two parties together and make them bury the hatchet. The reserves issue was so contentious that it was shifted out to a committee chaired by a former RBI Governor, Bimal Jalan, with members very widely drawn with people holding diverse opinions. It includes Rakesh Mohan, a former Deputy Governor who has written and spoken about how these reserves should not be handed over to the government. I must commend all concerned for having constituted a committee which was diverse in terms of opinions.

About the business of dividends and reserves, I just want to make one important distinction here: the dividends payable every year in full or in part are a flow going from the RBI to the Government of India. The dividends that are not paid and are put into reserves have become a stock and it was the handing over of that stock of reserves which was at issue in October-November. This dividend, the flow dividend which goes every year from the RBI to the government, goes into the non-tax revenue of the Union budget. And if you look at the non-tax revenue of the Union budget it is only 14 per cent of the total revenue, most of it is tax revenue. But within non-tax revenue, the dividend paid by the RBI over the years, and this year too, is unfortunately a very large item. It is a very large contributor to non-tax revenue. This

fiscal, for instance, the total flow dividend paid by the RBI amounts to ₹ 68,000 crore. This ₹. 68,000 crore amounts to 92 per cent of the total dividend received by the government from all the public sector banks and from all the publicly-owned financial institutions. Just imagine, the government owns the State Bank of India and so many other banks, so many other financial institutions, and 92 per cent of the dividend received as non-tax revenue from financial institutions owned by the central government comes from the RBI. Now this is a very bad thing because it makes the government fiscally dependent on the RBI and that is not a good relationship. Why?

The reason is that if they are so dependent on the dividend coming from the RBI, they will start questioning every rupee expenditure of the RBI because every rupee expenditure by the RBI is a rupee of non-tax revenue denied to the government and there is no government we have ever had in this country that has not been revenue hungry. This revenue hunger is a constant feature of Union and State governments at all levels. So, if there is so much dependence, the government will start looking at the RBI as a cash cow. It is looking at the RBI as a cash cow and that is not a very good situation to have.

In the next segment I will be going into the functions of the RBI and you will be truly amazed to know how many functions it performs. It performs all these functions with a total staff size in all its 31 regional and sub-regional offices, training institutions and so on, of just 15,000 employees. It is one of the leanest and most efficient organizations in the country. Now, imagine if the government starts saying why are you having 15,000, reduce your staff to 14,000, or if it starts questioning the remuneration pattern for RBI staff, you know, you are paying too high salaries, your pension levels are too high. In fact, when I was on the board, a long-standing pension dispute which was not being approved by the bureaucrats in North Block was for this very reason, that it was needless expenditure.

Why is it so important that the RBI should be free to hire as many people as it wants and be free to pay them whatever it wants? That

is because the functions the RBI performs are so foundational to the stability and the well-being of the economy that we need very good professionals in the RBI, really well-trained officials, willing to learn throughout their lives, and if the RBI pays very poor salaries, it will not attract the calibre of people needed. This is my fundamental fear of the fiscal dependence of the government, that there would be continued pressure on the RBI to reduce its staff size, not pay as much as they should, not be able to pay as much as they should to train these people. The central bank of China, the People's Bank of China, is constantly sending its staff abroad to get PhDs from the best universities. And the best universities like Harvard are willing to take them into their PhD programme because the Chinese government covers their fees. They are full fees-paying students for five-six years while they work to get their PhDs. So, we have to be generous about training provisions for officials of the RBI, give them good remuneration, good housing, good pensions and then you attract good people. If the government acts as a constraint, we the people of India will suffer for it.

Now, let me go the next segment, the functions of the RBI. The RBI is called a full-service central bank. That is because in addition to the four core functions which are performed by central banks all over the world, there are an additional set of four functions the RBI performs in India – and I am just speaking of the key functions. There are many other subordinate functions which it performs. Let me begin with the core functions. I have already mentioned two of them so far and the most important is the monopoly right to issue currency. Now, that sounds very trivial. It sounds as though all they have to do is churn out the currency notes at the currency note press in Nashik but it is not that simple. It is an extremely difficult task because if you are assigned the monopoly right to issue currency, you have to ensure that nobody else issues that currency, you have to guard against counterfeit currency. That means that you have to be ahead of the competition regarding the quality of the paper, the printing, the various features on it which make it unique; you constantly add more and more features to it so that counterfeiters will not be able to keep pace. Thus, there

is also a security feature to this; issuance of currency by itself is a great function. Monetary policy and ensuring price stability come second. In all countries, the central bank is the monetary policy agent and that and the issuance of currency are its two main functions everywhere. Third, the RBI like central banks everywhere, is the guardian of financial stability in the country. Traditionally, the particular function which used to be quoted to show its role in ensuring financial stability was described as 'lender of the last resort'. What we mean by that is that the central bank, at its discretion, can step in to help a financial institution whether publicly or privately owned, if it is threatened with bankruptcy, even if bankruptcy is the result of absence of due diligence, misbehaviour or poor risk assessment or whatever else. The central bank is nevertheless charged with the function of being the lender of the last resort to such failing companies so as to guard against financial instability; that is, you help out someone who is not deserving of help just in order to ensure that there is no domino effect in the economy and that other institutions are not affected by what is called financial contagion, that is the spreading of the infection of bankruptcy.

After the global crisis of 2008, the role of guarding the financial stability of the country gained great importance when the G20 got together and decided on a concerted course of action for all its member countries and all other countries in the world to take such that if each one guarded the financial stability in their own country, global financial stability would be ensured and that it could not be ensured in any other way. In accordance with the G20 resolution, all central banks were asked to issue financial stability reports twice a year. The RBI issues financial stability reports every June and December. These become add-on functions for the RBI. It cannot hire more employees to do the financial stability report and so they have to adjust their tasks to produce the report. Now, there are some corollary functions of guarding financial stability, that is, banking regulation and supervision. In India, banking regulation and supervision is performed. These are separate and are performed within the RBI but in other countries they

have been taken out of the purview of central banks either in part or in full. In Canada for instance, banking supervision is done entirely by an organization independent of the central bank. The Office of Supervision does the supervision. They ensure that banking rules are being heeded. The US has a very complicated set-up; some banks are regulated by the Federal Reserve and others by state-level regulators; supervision is similarly split. Countries have varying provisions but in India, it falls squarely within the ambit of the RBI. It is a huge job in itself. And finally, as part of the core functions of all central banks, the RBI is banker to all governments in the country and maintains the banking accounts of all scheduled and commercial banks.

These four core functions are a massive responsibility; being the guardian of financial stability is the most important. Although the RBI has been constantly criticized for being too conservative, most recently by the Union government when it said, “Hand over those reserves to us. What are you keeping those reserves for?” let us not forget that the RBI has an AAA rating in the international financial market. That by itself is a huge source of confidence: while the central bank has an AAA rating, the Union government does not. In fact, it is languishing somewhere well below. Therefore, of the two parties, there is no question which is more financially sound and prudent, although you could say the RBI was erring on the side of conservative.

In addition to banking regulation and supervision, the RBI is the issuer of public debt. It issues public debt for the central and all State governments. In the Financial Act 2015, an unsuccessful attempt was made to take public debt issuance out of the RBI’s jurisdiction into something called the Public Debt Management Agency (PDMA). It was a very ham-handed effort. What was wrong with it was removed by Finance Minister Arun Jaitley before the final bill was presented to Parliament for passage. So, as things stand, public debt issuance is still with the RBI. What was wrong with the bill was that it could only talk about the public debt issuance of Union government securities, it could not talk about State government securities. So, the PDMA by

definition could only take over the task of the public debt issuance of the Union government.

But then, the same amendment proposed in the bill suspended the Government Securities Act 2006 under which the RBI issued the debt of both the Central and State governments. This amendment was so badly designed that it stopped the RBI from issuing any sort of debt. It was transferring to the PDMA the right to issue only Union government debt. How were State governments going to issue their debts? From the day this act came into effect, there would be no agency empowered to issue State government debts. That's why many people wrote about it and it was withdrawn and public debt issuance is still with RBI. In India it is the manager of foreign exchange under the Foreign Exchange Management Act (FEMA) 1999. Prior to that there was FERA (Foreign Exchange Regulation Act). And so, the RBI maintains the external reserves of the country and it is charged with ensuring a smooth foreign exchange market. It does not target any external value of the rupee but is in the business of ironing out volatility in the foreign exchange market.

In addition, with India being a developing country, the RBI has to play a developmental role in rural credit and financial inclusion. Last and by no means least, the RBI is the only source of data on balance of payments and financial value of exports. The DGCIS (Directorate General of Commercial Intelligence and Statistics) does maintain data on the physical flow of exports and imports, but the payments data are available only from the RBI. The RBI has stepped into the breach when there was nobody to perform a particular function. For instance, if you want to get information on State finances: the RBI has an annual publication on State finances in which it gives you all the information regarding the state of affairs of all the States of the country. This is a huge data function being performed by the RBI.

The RBI has a long list of publications. There are the annual reports on currencies and finance, quarterly publications and the monthly RBI bulletin. Then there is a weekly statistical supplement on the trend in

banking in India, the financial stability reports and the annual reports on State finances. I live on the strength of State finances and therefore for data I go to the RBI. The Union Ministry of Finance also brings out consolidated public finance data but this is for the Central and State aggregate. If you want to know about a particular State like Telangana or Gujarat, you have to go only to the RBI publication. There is no other source. They also have an online data base.

This brings me to the end of the special functions performed by the RBI; overarching this whole thing, it has to be vigilant against cyber threats. It has to preserve the cyber security of all its operations. That is neglected but it is so upfront in terms of what the RBI has to do that I don't know if you remember some years ago the Bangladesh central bank lost a billion dollars because their account with the bank was hacked into. So, this is a measure of vigilance which the RBI has to exercise the entire time. It is not just with regard to currency but accounts with other banks. It has to ensure cyber security and the physical security of its premises.

Just to give you a small example. In any canteen facility, a department of the central government is asked to outsource operations. The RBI can't afford to do that because they will be at the mercy of the outsourcing agent and compromise vigilance. A terrorist in the guise of a cook can enter the building and blow it up. The RBI, therefore, I want to stress again and again, cannot be treated on a par with the departments of the Government of India. It is very separate, it is very special, it is very foundational. You cannot say that they should outsource their functions and not have in-house staff who are cooks and dish-washers because they have to protect the physical premises and the security of their operations.

Now I'll get to the next segment which is the functioning of the Central Board in practice. In the first segment I dealt with the statutory role of the board. But how does it actually function in practice? How does it keep track of all the functions? The way it is done is that six

meetings every year are mandated; board members are put into various committees to oversee particular functions. Two of these committees are so important and powerful that they are themselves called boards. So, there is the Board of Financial Supervision (BFS) which is a very powerful committee of the board. The other board which is so important is the Board for Payments and Settlements (BPS). Then there a bunch of other committees for audit and securities; I was a member of some of those committees. These boards meet quarterly and they report to the Central Board.

How did this whole system function? There were some lacunae and lapses. What happened was there I was a member of the Central Board and this mess was building up in Punjab National Bank (PNB) which had to do with supervisory failure at the end of the day. Because there was this double layer of supervision, those of us who were not members of a particular committee tended not to look at that function at all. We just waited for the BFS to come and give us their report. They said everything was fine and we believed them.

Similarly, the committee that I was a member of spoke to the Central Board. Looking back, I think the problem was that whether it was the Board of Financial Supervision or the Audit and Risk Management Committee of which I was a member, we did not have enough time. Typically, the meeting would take maybe three hours but it really needed a lot more time. I think especially the BFS should have examined all the circulars issued during the quarter under review. They should have looked into the circulars, looked into the deadlines specified in those circulars and asked for data on whether those banks had responded by those deadlines. What was the penalty, what was the wording of the circular? That was the kind of detail you have to go into if you do not want these scams to happen. I think these meetings have to be of slightly longer duration, six hours if not all day. I don't know if you remember, the November 19<sup>th</sup> meeting, which was the big meeting when the resolution was passed, lasted the whole day. The media persons standing outside were really getting tired because

they had set up all their equipment around 12 when they expected the members to come out. It was 5, 6 pm and they were not coming out and when they finally did, it was a long wait. It was very unusual for a meeting to go on for an entire day but that is the kind of time you need if you want the Central Board to be the watchdog it is meant to be.

Finally, the last of my six segments. I am economist, I must report to you on what the economics literature says about the autonomy of the central bank. Does it say anything about giving autonomy to the central bank being a good thing? As it happens, it is not very widely researched but there is one economist named Alex Cukierman who in the 1980s did a series of studies which had a huge impact. He established through cross-country regressions that the more autonomy a central bank had the better its performance was. The minute you talk about a research result like that you have to ask how he measured autonomy and how he measured performance. How he measured autonomy was by the duration of time served by the governor as a fraction of the statutory term he was given. So, if on average, the governors served out their full statutory term, then that country would get a value of the autonomy measure 1. If, say, there were two governors in the history of the country and one of them served only a half term and the other served out a full term, then you would be taking an average of 1 and 0.5 and you will be getting an average of 0.75. When Urjit Patel resigned, he pulled down the autonomy average by that measure for our country because he had a year left in his three-year term. But it is an average across governors and that's how Alex Cukierman measured it. This was in the 1980s and he measured outcome in terms of inflation control.

You must remember that economists work in a context and the prime concern of the whole world was inflation. There had been two oil price hikes – in 1973 and 1979 – and 1980 was the time when they were all desperately trying to control their inflation and bring it back to ground level. So, he took that as an example and established that

the more autonomy you give to the central bank the better able it will be to control inflation. Then when the global crisis broke, all the reporters went to Alex Cukierman with a microphone and said, "Autonomy is a very good thing, the Federal Reserve had a lot of autonomy, what happened? They failed completely. They collapsed. And they brought the world down with them." Of course, Cukierman had to backtrack a little and admitted that price stability was not the only thing that mattered but financial stability also did and that requires much more than keeping track of prices; it means keeping track of financial markets in general, derivatives, risk and so on.

I want to end here. I just want to refer to the reserves issue where I said I am willing to wait for the report that will be put out by the committee which has been constituted. I respect the committee, the members, and I am hoping that they will come out with a considered judgment. I want to repeat that whatever their judgment, I don't think they should compromise on the need to keep the Reserve Bank free from fiscal pressures from the government. The Reserve Bank must be free to perform its own functions without having someone breathing down their necks constantly saying give me more, give me more, whether of the flow dividend or the reserves.

Finally, what were the other issues that were raised during the big blow up in October-November? A lot of them had to do with the liquidity crisis consequent upon the IL&FS default. There was a contagion impact on non-banking financial companies. The government wanted the RBI to do a lot more to ease the credit crunch. The RBI had done a lot already when the first default took place. I don't think they can be faulted for that score but a lot of other issues were raised by the government like Tier 1 capital adequacy. Under the Basel Rules only 4.5 per cent is required. In India, the RBI has regulated it to be at 5.5 per cent. The government said why do you want 5.5 per cent, do it at 4.5 per cent and you will free up more credit in the economy. The RBI's response was that they were in charge of ensuring that banks are prudentially regulated, and in their judgment, 5.5 per cent was what

was required. And in the present situation when banks are in terrible shape, international markets feel comfortable knowing that they are being regulated by such a conservative regulator. The Tier 1 capital adequacy is a whole one per cent more than what the Basel Rules require. They feel that the Indian financial sector is in good hands and they feel encouraged to enter into India. These issues should not be forgotten when we examine the decisions that the RBI takes.

Let me conclude by saying it is not as though this was the first time that RBI governance was questioned. There have been periods in the past when the governance of the RBI was questioned. Like, for instance, during the Harshad Mehta scam or the Ketan Parikh scam when not only the government but Parliament also raised questions about the internal management of the RBI and how such scams could have happened. The RBI responded in a very positive way and processes were tightened and so on. I have a lot of faith in the RBI as an institution. It has a long history and it has guided us well. It has guarded the financial stability of the country and I hope even though the RBI Act gives the government the upper hand, the government will continue to look upon the RBI proudly, and be proud of the way the RBI has functioned, be free to criticize it and also take criticism from it, and not treat it like a department of the Government of India.

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*Dr Indira Rajaraman (b. 1947) was a member of the Central Board of Directors of the RBI, (2011-2015). She was also a member of the Thirteenth Finance Commission. From 1994 until her retirement in 2007 she held the Reserve Bank of India Chair at the National Institute of Public Finance and Policy, Delhi, and from 1976 to 1994 she was on the economics faculty of IIM-Bangalore.*

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## Appendix

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Date	Topic	Speaker
1. March 22, 2003	The Constitution of India	Soli Sorabjee
2. June 21, 2003	Empowering the Deserving	N. Vittal
3. September 6, 2003	The Judicial System - The Need for Urgent Reform and Uniform Civil Code	Ram Jethmalani
4. April 20, 2004	Law and Judicial System for the Next Society	Justice M.N. Venkatachaliah
5. June 19, 2004	Indian Foreign Policy Challenges in the 21st Century	G. Parthasarathy
6. January 10, 2004	Corporate Governance	Y.H. Malegam
7. October 10, 2004	The Diabetes Epidemic - Why and What We Can Do	V. Mohan

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<b>Date</b>	<b>Topic</b>	<b>Speaker</b>
8. January 13, 2005	Mindset to Succeed in a Globally Competitive Economy	Raghuram G. Rajan
9. April 2, 2005	Fiscal Governance and Budget 2005	Yashwant Sinha
10. August 20, 2005	First World People and Third World Politics	Jayaprakash Narayan
11. January 16, 2006	Fiscal Prudence v. Public Expenditure	S. Narayan
12. July 22, 2006	The Challenges Before Indian Policing – the Way Ahead	Kiran Bedi
13. January 16, 2007	The Indo-US Nuclear Deal: What it Means to India	M. R. Srinivasan
14. September 8, 2007	Judicial Activism – Are Courts Overstepping their Limits?	Harish Salve
15. January 26, 2008	The Need for Recognition, Regularization and Regulation of Eye and Vision Care Practices in India	Jay M. Enoch
16. July 12, 2008	Is Loan Waiver a Solution for the Agrarian Crisis?	P. Sainath
17. March 23, 2009	Economic Agenda if NDA is Voted to Power	Arun Shourie
18. April 30, 2009	Perception of the Challenges Which the Indian Economy Will Face	Subramanian Swamy
19. August 29, 2009	Tax Havens and Illegal Wealth of India	R.Vaidyanathan

<b>Date</b>	<b>Topic</b>	<b>Speaker</b>
20. September 18, 2009	Dharma of Capitalism	Gurcharan Das
21. November 14, 2009	The Business of Education	G. Viswanathan
22. September 4, 2010	Good Governance and the Role of the Lokayukta	Justice N. Santhosh Hegde
23. December 18, 2010	Real Significance of Scams	Arun Shourie & N. Vittal
24. March 26, 2011	Deeper Aspects of Hinduism & Humanism in Islam	Mumtaz Ali & K. Subrahmanyam
25. September 17, 2011	Revisiting Centre-State Relations	Nirmala Sitharaman
26. March 17, 2012	Judges: Appointment and Accountability	Justice A.P. Shah
27. August 24, 2012	The Art of Advocacy	Lord Peter Henry Goldsmith
28. August 25, 2012	Judicial Activism and the Alternatives	Arun Shourie
29. July 13, 2013	Is Cricket Facing a Credibility Crisis?	Bishan Singh Bedi
30. October 18, 2013	India and the World	Narendra Modi
31. July 9, 2015	From Nani Palkhivala to V.S.Naipaul	V.K. Raju
32. February 27, 2016	Are We Ready for the Fourth Industrial Revolution?	S. Ramadorai
33. June 24, 2017	Putting India on the Fast Track	Suresh Prabhu
34. March 23, 2019	Decoding the Reserve Bank of India and Government of India Relationship	Indira Rajaraman





