THE REFORM OF THE JUDICIARY

by

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"Free Enterprise was born with man and shall survive as long as man survives."

—**A. D. Shroff**
1899-1965
Founder-President
Forum of Free Enterprise

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I deem it a great privilege to have been asked to deliver this year's A. D. Shroff Memorial Lecture. Mr. Shroff was the product of London School of Economics. He taught advanced banking at the Sydenham College of Commerce and Economics and for more than 40 years was associated with a number of industrial and commercial enterprises including Tatas. Some of them owe their origin and development to him. In 1938 he served as a Member of the National Planning Committee of the Indian National Congress. Pandit Nehru was the Chairman of that Committee. Mr. Shroff was one of the non-official delegates to the Bretton Woods Conference in 1944 which set up the World Bank and the International Monetary Fund. He also served on the Shroff Committee on Finance for the Private Sector set up by the Reserve Bank of India. Mr. Shroff was the Founder-President of the Forum of Free Enterprise and it seems in the fitness of things that the Forum should arrange every year a lecture on his death anniversary. When I look at the galaxy of eminent men who have delivered these lectures in the past, I find myself seized by feeling of trepidation but I have had to shake it off in view of the letter from Nani Palkhivala, which I consider to be more or less in the nature of a command.

Free enterprise, in the words of A. D. Shroff, "was born with man and shall survive as long as man survives". It is an offspring of the quest for freedom, a live rendering of

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* The author is a former Judge of the Supreme Court of India. The text is based on the A. D. Shroff Memorial Lecture delivered by him under the auspices of the Forum of Free Enterprise in Bombay on 13th October 1980.

the longing in human heart to shape one's affairs unhindered by official cramps The freedom to disseminate ideas, opinions and concepts, the freedom to treat with complete candour the various aspects of human life and activity, and the freedom to voice one's aspirations and feelings are vital to progress in a free society. Freedom of enterprise is one step ahead of the freedom to disseminate ideas, still the two have a close nexus and are linked with each other. Nothing brings law into greater disrepute and breeds stronger feeling of defiance than an attempt on its part to make men see opinions which they hold for true, regarded as crime. Likewise nothing creates greater frustration and dismay than the mandarin obstruction to any venture marked by spirit of initiative and enterprise. Freedom at the same time is not and cannot afford to be allergic to all restraint. It indeed needs some restraint for its own survival. As such there is no conflict between restraint per se and freedom. The real conflict is between the restraint that cramps the personal life and the spiritual order and the restraint that is aimed at securing the external and material conditions of their free and unimpeded development. The essence of freedom lies in the unhampered development of the personality of each individual so that the efflorescence of his faculties might lead to satisfactory harmonization of impulses. Restraint degenerates into an attack upon freedom where it stifles such development. Any restraint which frustrates the life and spiritual enrichment must be looked upon as an evil. The world has a certain stock of knowledge which has been garnered through the toil of succeeding generations of men. Each generation as a successor of the earlier generations has a right to put that knowledge to use. It is not wise under the garb or because of any notion of paternal supervision to deny opportunities to individual members of the society from pushing the bounds of that knowledge further and harnessing it to proper use. All that has to be ensured is that in doing so the individual does not impinge upon the right of others or commit breach of any provision for the benefit of society as a whole.

Any talk of freedom inevitably takes our thoughts to the courts and judges for through the course of years and

in the corridor of time they have acquired the image of being sentinels of human freedom and guardians of basic rights. Whenever, therefore, there is mission of freedom and infringement of rights we turn to the courts and judges to provide redress. Indeed it is the capacity of the judges and the courts to provide redress in such cases which furnishes the real index of the prevalence of the rule of law as against the rule of men. But courts and judges have not always satisfied that test. Past history of mankind and contemporary world are not lacking in instances when law has been used as an instrument to abridge or extinguish freedom instead of expanding its frontiers and the machinery of courts has been used to exterminate the political opponents and silence the voice of dissent. While ideals of justice and the concept of over-riding rule of law have at times helped to limit arbitrary and unjust rule, it is also unfortunately true, as observed by a discerning writer, that great and systematic iniquity has been done by men who claimed to be acting under law and whose actions were facilitated by institutions like legislatures and courts that we would generally characterise as legal. Nothing suits dictatorship more than a subservient judiciary willing to carry out its behest. The totalitarian states indeed are never tired of claiming a legal basis for their action and are too eager to make use of conventional legal institutions to further their ends. Justice then has to bow out because the court in such a situation becomes an instrument of power, Judges are soldiers putting down rebellion and a so called trial is nothing more than a punitive expedition or ceremonial execution — its victims being Joan of Arc, a Bruno or a Galileo. It is for this reason that all lovers of freedom have also espoused the cause of a strong and independent judiciary, of having persons on the Judge's seat who would not falter or swerve from the ideal of administering justice without fear or favour, whatever may be the pressure and however great the temptation. Weak minds and timid characters, they know, ill go together with the office of a judge.

The title, "Reform of the Judiciary" should not lead us to suppose that there is something basically wrong with

the judiciary and it calls for radical and wholesale reform. By and large the judiciary, especially the judiciary in India, has maintained high standards. Speaking as I am to an audience in the city of Bombay, I have no doubt that most of you would agree having had experience during post independence years on Bombay High Court of a Chief Justice who though now frail in health is strong in will and epitomises within himself the great and noble traditions of judiciary. At the same time it would not be realistic to shut our eyes to some of the infirmities which have crept into the judiciary and made themselves manifest.

A state consists of three organs, the legislature, the executive and the judiciary. The judiciary, it has been said, is the weakest of the three organs. It has neither the power of the purse nor the power of the sword, neither money nor patronage nor even the physical force to enforce its decisions. Despite that, the courts have, by and large, enjoyed high prestige amongst, and commanded great respect of the people. This is because of the moral authority of the courts and the confidence the people have in the role of the courts to do justice between the rich and the poor, the mighty and the weak, the State and the citizen, without fear or favour.

A modern State has to arm itself with immense powers with a view to implementing socio-economic policies and schemes for welfare measures. These powers have to be exercised through a host of officers at various levels of administration. The grant of such powers has to be cushioned with the right of aggrieved citizen to approach the courts with a view to ensure that in exercise of these powers, the State acts within the bounds of the law and the executive officers do not act arbitrarily or capriciously. The liberties of the citizens face real danger in insidious encroachments by men of zeal, well-meaning but lacking in due deference for the rule of law.

For efficient discharge of the responsibilities of the courts, it is essential that the broad confidence which the people have in them, the high prestige and the great respect

they have enjoyed should be maintained and not be subject to any eclipse. The community has a tremendous stake in the preservation of image of the courts as dispensers of justice. We must guard against under-mining the broad confidence of the people in the courts or detracting from the image of the courts as dispensers of even-handed justice. Any such tendency poses a grave danger for the well-being and security of the society for inevitably it must turn people to the extra legal methods for redress of the grievances and for settlement of their dispute. This would not only disturb the even flow of the life of the community but would also in the long run erode the democratic structure of our polity. Nothing rankles more in the human heart than a brooding sense of injustice. Any feeling or consciousness of the incapacity of the established courts to afford relief for the wrongs and injustice, supposed and real, takes people's thoughts to dangerous channels and drives them to seek recourse to method which are other than legal and smack of a state of jungle or the rule of tooth and claw. It is, therefore, essential that whatever weaknesses have crept into the structure of our judiciary should be eliminated so that our judiciary may emerge stronger and healthier. It is in that context that the reform of the judiciary becomes relevant and acquires importance.

It is apposite that the question of reform not only of the judicial system but of the judiciary is engaging serious attention. We are today passing through an age of social questioning. There is all round a spirit of iconoclasm. The gods we worshipped till yesterday have been slowly and gradually dethroned from the minds of the people. No institution can take for granted the reverence of the community. The community demands from every institution the justification of its existence, the proof of its utility. There was, at one time, an aura about the judiciary. It created a sense of there being something mystique about it in the minds of the people. Under the cover of that, we could hide some of the short-comings and drawbacks of the institution. To some extent, we in the world of law have thus thrived on the ignorance of others. Such a time is now

past and no more. The legal institutions and the courts have to earn reverence through the test of truth. They cannot brush under the carpet criticism, if true, however unpalatable it may be. It may become essential to do a bit of heart-searching and indulge in a bit of introspection. If, in the process, we discover drawbacks and infirmities, enlightened self-interest demands that we should set the same right. Justice, it has been said, is the first virtue of social institutions, as truth is of systems of thought. Legal institutions, no matter however efficient, must be reformed or abolished if they are unjust.

Any improvement in the tone or level of the judiciary at the High Court level must start at the stage of initial appointment. It has to be ensured that the best persons are selected and that merit alone is the criterion that prevails in selection. It has been rightly pointed out by the Law Commission that a person appointed not on merit but because of favouritism or other ulterior considerations can hardly command real and spontaneous respect of the bar. Anyone who is familiar with the working of the courts, would bear testimony to the fact that unless we have persons presiding over the courts who command real and spontaneous respect of the bar, the court proceedings are liable to run into difficulties. In any system of dispensation of justice, much depends upon the personality of judges; the most well-drafted codes and laws, the most well-prepared schemes of legal reform would prove to be illusive if those concerned with construing and implementing those laws are lacking in right calibre. The presiding officers' efficiency, tact, devotion, diligence, mastery of law or lack of them can make all the difference in the way the court proceedings are conducted and the cases are handled in courts. It is common experience for the members of the bar to find that a case takes before an incompetent judge much more time than that taken before a competent judge. Wrong appointments affect the image of the courts and undermine the confidence in, and respect for, the High Court amongst the litigants, the members of the Bar and the general public. Besides that they affect the quantum of output and the quality of

judgments. Cases have also not been unknown when one wrong appointment has deterred competent persons from subsequently joining the Bench despite all the entreaties of the Chief Justice.

In order to attract persons of the right calibre to the Bench, something would have to be done to improve the service conditions of the judges. This might also take into account variety of benefits, including the quantum of pension, to which they would be entitled after retirement. While it is true that the pay-scales of the judges cannot be wholly divorced from the general pattern of pay structure of the country at the higher levels, it has also to be borne in mind that bright and capable members of the Bar by sticking to the profession can earn much more. In the eyes of some there may be a halo around the office of judgeship. The halo has, however, been getting dimmer and dimmer with the efflux of time, the rising spiral of prices and the disparity between the professional income and the salary of judges. Some measures have recently been adopted to improve the service conditions of the High Court Judges by providing them rent-free house and giving them a conveyance allowance. However, having regard to the existing tax laws, the steps taken in this respect may perhaps not provide adequate relief.

The question of transfer of judges of the High Courts has aroused strong emotions. Normally we should avoid transfer of judges from one High Court to the other as the power of transfer is liable to be abused and impinges upon the independence of the judges. Normally a judge should continue in the court to which he is appointed except where he is appointed Chief Justice of some other High Court, and also except where the transfer takes place at his own request and with the concurrence of others concerned. There are occasions—we hope rare—as pointed out by the Law Commission, when the image and good name of the judiciary makes it incumbent that a judge posted in a High Court be transferred to some other High Court. Although, by and large, the judges of the High Court have

maintained high standards, sometimes individual cases reveal disturbing facts. The facts of the case may not be such as might warrant resort to the extreme remedy of impeachment, still the requirements of the situation may call for the transfer of the judge concerned. The transfer of the judge in such an event is essential in the interest of justice and for preserving the image of the court. It would not be proper in such an event to look upon the transfer as something taboo. At the same time we have to ensure that the power of transfer is not abused and is not motivated by extraneous considerations. To prevent any abuse, we might give consideration to the suggestion of the Law Commission that no judge should be transferred without his consent from one High Court to the other unless a panel consisting of Chief Justice of India and his four senior-most colleagues finds sufficient cause for such a course.

Complaints of favouritism have sometimes been levelled against some Chief Justices in the matter of appointments of judges. It is very difficult to say as to how far those complaints are well-founded. But the vehemence and persistence with which these complaints have been made may make it necessary to give serious thought to the suggestion of Law Commission, according to which the Chief Justice of the High Court while making the recommendation for the appointment of a judge of the court should also consult his two senior-most colleagues. In the letter containing the recommendation for the appointment, the Chief Justice should state that he has consulted his two senior-most colleagues and also indicate the views of each of those colleagues in respect of the person being recommended. Consultation with the two senior-most colleagues will have a healthy effect and considerably minimise the chances of any favouritism. Incorporation of the views of the two senior-most colleagues in the recommendation of the Chief Justice would enable the other authorities who come into the picture and who in the very nature of things would not have as much personal knowledge about the suitability of the person recommended to know as to how far other

senior colleagues of the Chief Justice feel about the recommendation. Views of the senior colleagues of the Chief Justice should, however, be confined only to comments on the suitability of the person recommended. It should not be open to them to suggest another name for appointment. Any recommendation of the Chief Justice which carries the concurrence of his two senior-most colleagues should normally be accepted.

Appointment of judges of the Supreme Court merits special consideration. In view of the special role which has been assigned to this court under the scheme of our constitution, it is essential that only persons of the highest calibre are appointed judges of the court and that no other factor except that of merit alone should weigh in the matter of appointment. The law laid down by the Supreme Court constitutes the law of the land. The fact that the court sits as a court of appeal against the judgments of the High Court makes it necessary that the judges of the Supreme Court should be persons of high eminence and stature and command such great esteem that even when the judgment of the High Court is reversed on appeal by the Supreme Court, the judges of the High Court should have a feeling that it has been done by a court which is not only higher in the legal sense of the term but also because it is composed of judges whose acumen is by and large acknowledged to be superior to that of the High Court judges. Every effort should, therefore, be made to ensure that the cream of the judicial talent in the country is represented on the Bench of the highest court of the land. According to some constitutional experts there is hardly any political question which does not ultimately resolve itself into a legal or constitutional question. Quite a number of cases coming up before the Supreme Court have political overtones. In view of this fact we should pay heed to the suggestion of the Law Commission that no one should be appointed to the Supreme Court as a judge unless for a period of not less than seven years he has snapped all affiliations with political parties and unless during the preceding period of seven years he had distinguished himself for his independ-

ent and dispassionate approach and freedom from political prejudice, bias or leaning.

The appointment of Chief Justice of the Supreme Court has on occasions become the subject matter of considerable debate. In India we have generally been following the convention of appointing the senior-most judge of the Court as Chief Justice. On a few occasions when we have departed from this principle, the appointment has aroused strong emotions and landed us in controversies. This has naturally affected the image of the office of the Chief Justice. The Law Commission has expressed the opinion that the vesting of unbridled powers in the executive to depart from the principle of seniority in the matter of appointment of Chief Justice is liable to be abused and is likely to make inroads into the independence of judiciary and affect the approach of some of the judges. The Law Commission has accordingly suggested that whenever the government considers it proper to depart from the principle of seniority for the appointment to the post of Chief Justice, in such an event the matter should be referred to a panel consisting of all the sitting Supreme Court Judges. The principle should be departed from only if the above panel finds sufficient cause for such a course. The above suggestion of the Law Commission deserves serious consideration at the hands of all concerned.

Any analysis of the reform of the judiciary would remain incomplete unless we take into account the subordinate judiciary and the trial courts at the district level. If an evaluation were made of the importance of the role of different functionaries who play their part in the administration of justice, the top position, as I said some time ago, would necessarily have to be assigned to the trial court judge. He is the key-man in the administration of justice. It is mostly with the trial judge rather than with the appellate judge that the members of the general public come in contact, whether as parties or as witnesses. The image of the judiciary in the general public is thus projected by

the trial court judges and this, in turn, depends upon their intellectual, moral and personal qualities.

Errors committed by the trial judge who is not of the right calibre can sometimes be so crucial that they change the entire course of the trial and thus result in irreparable miscarriage of justice. Apart from that, a rectification of the error by the appellate court which must necessarily be after lapse of a long time, can hardly compensate for the mischief which resulted from the error committed by the trial judge.

It is well known that the disposal of cases takes considerable time. All of us are naturally perturbed over that. A number of suggestions have been made off and on to improve the working of our subordinate judiciary with a view to eliminate delays and ensure prompt disposal of cases. The most important factor in the elimination of delays is the personality of the trial judge. He is the linch-pin of the entire system. Nowhere, it has been said, in the whole range of public office are weaknesses of character, intellect, or psychic constitution revealed more mercilessly than in the discharge of the responsibilities of a trial judge. The advocates engaged by the rival parties fight tenaciously to protect the interest of their clients. No one can preside effectively over such a situation if he is mediocre in intellect or professional skill, lacking in decisiveness, or is otherwise not emotionally stable. The court-room decorum, it has been observed, has to be maintained with a firm hand if cases are to be tried fairly and expeditiously. As the case proceeds, the trial judge is called upon to make many rulings and pass interlocutory orders which are of great strategic and tactical importance for the ultimate decision of the case. These rulings have to be given and orders made under the pressure of the trial and without opportunity for elaborate arguments. The trial judge, it has been said by a discerning writer, who is shaky in professional understanding, imperfect in moral resolution, or unduly conciliatory in personality, will inevitably be over-powered and overborne by forceful and aggressive trial counsel.

The evil that weak judges do, less often from partiality, as commonly supposed, than from simple psychic inability to stand up to abrasive or strong willed leaders of the trial bar is a bitter but largely untold story in the administration of justice. Other shortcomings which sometimes mar the proceedings in a court of law and leave a bad taste with litigants and witnesses are short temper, peevish nature, irascible disposition, overbearing manners and undue impatience of a trial judge. Proper and fair trial require not only professional competence; it also needs cool temperament, mental firmness and capacity for remaining unruffled despite the provocation given and the stress and strain caused by the unscrupulous conduct of those who appear during the course of the trial. If, as observed by Roscoe Pound, men count more than machinery in administration of justice, it is imperative that they should be men of the right calibre.

It is, therefore, essential to attract young bright law graduates and lawyers of the right calibre to the judiciary. This can only be done if there are good pay-scales for the judicial officers. It is, no doubt, true that the pay-scales of the judicial officers should normally be such as fit in with the general pattern of pay-scales of other government officers of equivalent rank; we should not also forget that bright young lawyers have prospects of earning much more in the profession. Unless, therefore, we are going to be content with mediocrity manning our judicial services, some allowance would have to be made on this account in fixing their pay-scales. It would be a sad day if the capacity for effective functioning of our subordinate judiciary is affected by thoughts of financial stringency. No officer can give his best if he is working under a sense of discontent.

The question of providing residential accommodation to members of subordinate judiciary is of great importance. As it is, we find that in a number of places a judicial officer, on being transferred to a new station, has to look for residential accommodation. For this purpose, he may have to approach some landlords or take the assistance of

some of local lawyers. It is plain that any of such practices is highly undesirable and is liable to be abused. To prevent this, we must have at all places where courts function sufficient number of residential houses for judicial officers. These should be at the disposal of the District Judge and should be allotted to the successor as soon as the present incumbent of the judicial office is transferred or retires. A number of other measures can also be taken to improve the working conditions of the subordinate judiciary. The matter has been dealt with at some length by the Law Commission. It would be for the authorities concerned to give thought to the recommendations of the Commission made in this behalf.

The welfare of the judiciary should be a matter of general concern. It would not be proper to drive ourselves to a situation wherein the judiciary itself may have to ask for amelioration of its service conditions. There is indeed a touch of irony and embarrassment in a situation wherein judges may have to assume the role of applicants and plead for their own cause. It is said that the deference shown to the judiciary in any society is an index of the level of its civilization and allegiance to the rule of law. Let us strive to see that we are not found lacking in this respect.

There is sometimes talk of a committed judiciary. Such talk is misleading and is bound to create wrong notions about the role of the judiciary. The commitment of judges can only be to the Constitution and the laws. Persons who are aligned with some political party or have affinity for some particular economic ideology are ill-fitted to occupy seats of justice. Whatever might be the role of judiciary in some totalitarian and other regimes in certain parts of the world, the traditions and norms which we have inherited as a proud legacy and which our founding fathers were keen to preserve was to have an independent judiciary. In the eyes of many a committed judge is a contradiction in terms. Allegiance to justice and commitment to some political or economic ideology cannot go together. A judge in order to be true to his office cannot worship simultane-

ously at two shrines—the shrine of justice and the shrine of his favourite political and economic ideology. We have to guard against any commitment which creates a tilt in our approach for inevitably it would render the task of fair and impartial administration of justice considerably difficult. An approach according to which in any and every dispute between the tenant and landlord the tenant is always in the right or between management and labour the labour is always in the right, makes a mockery of justice. Equally, if not more, perverse is the approach according to which the landlord and the management in every dispute are always on the right side. No section of society consists only of saints and the other section only of sinners. It would be wrong to start with a presumption that because one belongs to one particular group he must always be in the right and the one opposed to him always in the wrong. We are all human beings and in all sections of society we have persons with strong points and human failings. Each case would need to be judged on its individual merits.

It is misuse of judicial office for any one who is protagonist of a particular ideology to use that office to propagate that ideology. A court room is not a pulpit nor a place for a crusader in the role of a judge to espouse some particular socio-economic theory. It is most unfair for a judge to use the protection and deference that attaches to his office for furtherance of political and economic theories which may have caught his fancy. Once this process starts, not only the judge concerned but the judiciary itself would get discredited and be dragged into controversies of partisan character. In the words of Frankfurter, if judges want to be preachers they should dedicate themselves to the pulpit, if judges want to be primary shapers of policy, legislature is the place. Self-willed judges are the least defensible offenders against government under law.

That all constitutional interpretations have political consequences, to repeat what I said in Kesavananda Bharati's case, should not obliterate the fact that the decision has to be arrived at in the calm and dispassionate atmosphere of the court room, that judges in order to give legitimacy

to their decision have to keep aloof from the din and controversy of politics and that the fluctuating fortunes of rival political parties can have for them only academic interest. Their primary duty is to uphold the Constitution and the laws without fear or favour and in doing so, they cannot allow any political ideology or economic theory, which may have caught their fancy, to colour the decision. The sobering reflection has always to be there that the Constitution is meant not merely for people of their way of thinking but for people of fundamentally differing views

Independence of the judiciary is one of the most important pillars of a democratic society for it is the presence of an independent judiciary which guarantees rule of law and ensures that the rights of minorities and those in opposition guaranteed by the Constitution shall not be trampled upon by the majority and those in seats of power. In Berne, the capital of Switzerland, one important street has been named as Justice Street. The street has on a high pedestal the statute of Goddess of Justice holding the scales even and with eyes blind-folded. This is the concept of justice which succeeding generations of mankind have cherished and nourished in all civilised societies. Justice, according to this concept, should be administered by judges who are independent and not affected in any way by the personalities of the litigants or other extraneous considerations. The expectation is that the judges would see to it that the scales of justice are kept even and not allowed to tilt or get loaded on one side or the other and that justice is administered without fear or favour. Third Schedule of our Constitution prescribes the oath or affirmation to be taken by the Judges of the Supreme Court and the High Courts before they assume office. The emphasis in the oath or affirmation is on performance of duty of office without fear or favour. The emphasis further is upon upholding the Constitution and the laws.

One of the greatest dangers which is faced by the judiciary is the tendency, raising its ugly head during recent years in some Asian and African countries, of using judicial

processes by those in power to harass their political opponents. Prosecution in such cases degenerates into persecution of the opponents. It is such cases which put a strain on and give uneasy time to the independence of the judiciary and provide a real test of the judiciary's claim and allegiance to independence. To repeat what was said by me some time ago, independence of the judiciary must be protected if we want to maintain the essential of a decent society governed by the rule of law. It is no test of the independence of judiciary that it can hold the scales even in ordinary run of cases between obscure citizens. The real test of the independence of judiciary arises when times are abnormal, when the atmosphere is surcharged with passion and emotion, when there is a brooding sense of fear, when important personalities get involved and when judicial processes are used by those in power to persecute political opponents under the garb of prosecution. At such times it is not so much the person arraigned as the accused who is on trial, as it is the judiciary which is on trial. Such moments can well prove to be the twilight of the rule of law. It is indeed then that our alligiance to the principle of the independence of the judiciary is put to the real test. Law knows of no finer hour than when it cuts through formal concepts and transitory emotions to come to the rescue of the oppressed citizen.

Years ago Learned Hand warned against the danger of political or other extraneous considerations influencing judicial decisions. While stressing the need for judges to keep away from political battles and assuming the role of legislators or seeking solution from their bosom for every problem which besets the nation, he observed:

> "If an independent judiciary seeks to fill them from its own bosom, in the end it will cease to be independent. And its independence will be well lost, for that bosom is not ample enough for the hopes and fears of all sorts and conditions of men, nor will its answers be theirs; it must be content to stand aside from these fateful battles. There are two ways in which the judges may forfeit their independence, if they do not abstain.

If they are intransigent but honest, they will be curbed; but a worse fate will befall them if they learn to trim their sails to the prevailing winds. A society whose judges have taught it to expect complaisance will exact complaisance; and complaisance under the pretence of interpretation is rottenness."

The desire to preserve the independence of the judiciary sometimes takes queer forms when it shuns any attempt to set the judicial house in order and rectify even flagrant violation of judicial norms and behaviour. The question we have to ask is—does our desire to maintain judicial independence postulate that we should keep quiet and turn a blind eye if a judge habitually comes late, does not observe court hours and rises early? Luckily the number of such judges is very small. Does judicial independence require that a judge should enjoy immunity from all criticism even if he takes a number of months to prepare his judgment even in most ordinary type of cases? Is it also the requirement of judicial independence that we should ignore the hobnobbing of a judge with politicians and other interested parties or shut our eyes to other lapses? We in the world of law have always decried executive arbitrariness. Much worse than executive arbitrariness is judicial arbitrariness. It would not perhaps be desirable to show hypersensitiveness in these matters. One is sometimes reminded in this context of what happened in England during last century. An address was proposed to be presented to the Monarch on behalf of the judges and the judges were discussing the wording of that address. The address contained the words "Conscious as we are of our limitations". Some judges raised objection that they should not use those words for themselves as they were judges. One judge, I think it was Lord Bowen, who thereupon suggested a change. "Supposing instead", he said, "We use the words 'Conscious as we are of each other's limitations'."

If our Constitution visualises that judiciary should be kept out of politics, we have also to ensure that politics is

kept out of the judiciary. It would perhaps be not correct to assume that the moment one dons judicial robes and occupies judge's chair, one necessarily undergoes transformation of character, sheds off all short-comings and suddenly rises into a stratosphere governed by high judicial ethics. It would essentially depend upon the individual concerned. Disillusionment awaits those who always expect judicial office to act as an alchemy for changing one's basic character.

History tells that great institutions face danger not so much from without as from within. Instances have not been lacking when institutions have been damaged and have suffered grievous blows at the hand of internal forces. The institutions generally are strong enough to withstand external threats but they give way and start crumbling when some of those manning the institutions are seized by selfishness and personal ambition. Goaded by such ignoble considerations they violate established code and norm of behaviour and resort to petty craft, low acrimony and puerile controversy. In the process they damage the institution and defile its image. We must take care that such a fate does not befall our judiciary.

The strongest weapon in the armoury of the judiciary is its unsullied image, the esteem it evokes and the confidence it enjoys. Reference is sometimes made to the contempt of court power of the judges to command respect. This, perhaps, is not correct and is apt to mislead. Contempt of court, as observed by a great jurist, "should not be used as a means to uphold our own dignity. This must rest on surer foundations..... We must rely on our conduct itself to be its own vindication."

India has in this century produced a number of great and distinguished judges—judges who have carved a name in judicial history, who have shed lustre on their office and who can hold their own in any count of great judges of the world. They had a touch of humility and chose to work

in their silent ways. But they were dedicated to the task and wedded to the highest traditions of law. There is, I feel, a general unawareness in India of the life and work of her great judges. This is unlike some of the advanced democratic countries wherein due recognition is accorded to the contribution of the nation's great judges. Thoughts of a great man of law are not windfalls of inspiration. They are the product of years of contemplation and brooding. It was said of a great judge that the anguish which preceded his decisions was apparent, for again and again, like Jacob, he had to wrestle with the angel all through the night; and he wrote his opinions with his very blood. But when once his mind came to rest, he was as inflexible as he had been uncertain before.

A tendency has been manifest, of late, to run down the judges when we do not agree with a decision rendered by them. Such a tendency needs to be curbed. The office of a judge demands that he must give his decision one way or the other. One of the parties in the very nature of things must feel dissatisfied with the decision given by the judge. It is one thing to dislike a decision; it is quite another to attack the judge because of the decision given by him. In the ultimate analysis the greatest asset and the strongest point of the judiciary is its image as dispenser of even handed justice. Every effort should be made to preserve that image. There is no office which is so infinitely powerful and at the same time so frightfully defenceless as that of a judge. All this makes it necessary to exercise circumspection in the criticism of judges. If the denunciation of judges by persons outside the field of law is undesirable, much more objectionable is the tendency betrayed on occasions by some judges of the superior courts—luckily their number is small —to run down the judges whose decisions are the subject matter of appeal. Use of strong language ill goes together with judicial temperament necessary for dealing with judgments of courts below.

To those who are prone to lightly criticise judges, one should say that though no exception can be taken to fair

and even out-spoken comments, the critics should bear in mind that from the very nature of their office, the judges cannot reply to criticism nor can they enter into public controversy, much less of a political nature. The rendering of a judicial decision is not always an easy matter. Chief Justice Hughes once said that when we deal with questions relating to principles of law and their application, we do not suddenly rise into a stratosphere of icy certainty. It would not be difficult to decide a case if only a single principle were involved. The difficulty, however, arises when the facts of the case reveal that it is in the neighbourhood of different principles. It is then that the painful process begins through self-searching of making a choice or of accommodating two or more principles. This for any conscientious judge is the agony of his duty.

Plurality of judgments by different judges in the same case has on occasions invited criticism. Such plurality cannot sometimes be helped. Occasions arise when there is difference of opinion among the judges hearing a matter with regard to the final decision to be pronounced or with regard to the reasons in support of that decision. In the former case, there is a majority judgment and there is also a minority or dissenting judgment. In the latter case, there are concurring judgments. The lack of unanimity upon difficult legal questions should cause no surprise. The history of scholarship is a record of disagreements. And when we deal with questions relating to principles of law and their application we cannot look for physical precision or arithmetical certainty. There have been different reactions with regard to dissenting judgment and the role of the dissenting judge. One view is that "comparatively speaking at least, the dissenter is irresponsible. The spokesman of the court is cautious, fearful of the vivid word, the heightened phrase. He dreams of an unworthy brood of scions, the spawn of careless dicta, disowned by the ratio decidendi, to which all legitimate offspring must be able to trace their lineage. The

result is to cramp and paralyse. One fears to say anything when the peril of misunderstanding puts a warning finger to the lips. Not so, however, the dissenter..... For the moment he is the gladiator making a last stand against the lions. The poor man must be forgiven a freedom of expression, tinged at rare moments with a touch of bitterness, which magnanimity as well as caution would reject for one triumphant." To complete the picture I feel it necessary to reproduce the concluding part of my dissent in the **habeas corpus** case :

> "I am aware of the desirability of unanimity, if possible. Unanimity obtained without sacrifice of conviction commends the decision to public confidence. Unanimity which is merely formal and which is recorded at the expense of strong conflicting views is not desirable in a court of last resort. As observed by Chief Justice Hughes, judges are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognised than that unanimity should be secured through its sacrifice. A dissent in a court of last resort, to use his words, is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."

It would be a mistake to rely too much on the courts and the laws for the preservation of liberties. There is no modern instance, it is said, in which any judiciary has saved a whole people from the grave currents of intolerance, passion and tyranny, which have threatened liberty and free institutions. The attitude of a society and of its organised political forces rather than of its legal machinery, is the controlling factor in the character of free institutions. The

ramparts of defence against tyranny, to repeat what I said some time ago, are ultimately in the hearts of the people. The Constitution, the courts and the laws can act only as aids to strengthen those ramparts; they do not and cannot furnish substitutes for those ramparts. If the ramparts are secure, anyone who dares tamper with the liberties of the citizens would do so at his own peril. If, however, the ramparts fall down, no constitution, no law, no court would be able to do much in the matter.

Like all other human institutions, the courts must earn reverence through the test of truth. Years ago Harold Laski in his tribute to Justice Holmes described the hallmarks of a great judge. A great judge, he said, must be a great man. He must have a full sense of the seamless web of life, a grasp of the endless tradition from which we cannot escape. He must be capable of stern logic, and yet refuse to sacrifice to logic the hopes and fears and wants of men. He must be able to catch a glimpse of the ultimate in the immediate, of the universal in the particular. He must be statesman as well as jurist, thinker as well as lawyer. What he is doing is to shape the categories through which life must flow, and he must have a constant sense of the greatness of his task. He must know the hearts of men, and yet ask to be judged from the conscience of their minds. He must have a constant sense of essential power, and yet be capable of humility in its exercise He must be the servant of justice and not its master, the conscience of the community and not of its dominant interests He has to put aside the ambition which drives the politician to search for power and the thinker to the construction of abstract system. No one must be more aware of the limitations of his material, none more hesitant about his personal conviction. The great judge is perhaps the rarest of human types, for in being supremely himself he must yet be supremely selfless. He has to strive towards results he cannot control through material he has not chosen. He has to be in the great world and yet aloof from it, to observe and to examine

without seeking to influence. At the same time he seeks to make the infinitely small illuminate the infinitely great. A political system which produces great judges can feel some real assurance about its future. These are stern and exacting tests but they set out an ideal and a goal, distant and remote from the reach of most of us though they may be, still for the attainment of which, even though partially and not in full measure, there has to be ceaseless striving and sustained effort.

The views expressed in this booklet are not necessarily the views of the Forum of Free Enterprise.

A. D. SHROFF

(1899-1965)

Founder President
FORUM OF FREE ENTERPRISE

After graduating from Sydenham College in Bombay and the London School of Economics, Mr. Shroff started as an apprentice at the Chase Bank in London. On return to India, he joined a well-known firm of sharebrokers and was also teaching advanced banking at the Sydenham College of Commerce & Economics. For over forty years, he was associated with a number of industrial and commercial enterprises, many of which owe their origin and development to him. He was a Director of leading concerns like Tatas.

Mr. A. D. Shroff, eminent economist and industrialist, was associated with promotion of planning in the country even before Independence. When Netaji Subhas Chandra Bose was the President of the Indian National Congress in 1938 he appointed a National Planning Committee with Pandit Jawaharlal Nehru as the Chairman. Mr. Shroff was one of the members of the Committee.

He was one of the eight authors of the well-known Bombay Plan presented to the country by private enterprise in 1944. He was also an unofficial delegate at the Bretton Woods Conference in 1944 which set up the World Bank and the International Monetary Fund.

He served on a number of committees including the well-known Shroff Committee on Finance for the Private Sector set up by the Reserve Bank of India.

"People must come to accept private enterprise not as a necessary evil, but as an affirmative good."

Eugene Black

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