THE ROLE OF JUDICIARY IN PARLIAMENTARY DEMOCRACY

M. C. CHAGLA

FORUM OF FREE ENTERPRISE
SOHRAB HOUSE, 235 DR. D. N. ROAD, BOMBAY-1

Post Box 48-A Tel.: 26-5214

Forum of Free Enterprise

235, Dr. Dadabhai Naoroji Road, Bombay 400 001.

A symposium on "THE FLOATING RUPEE" will be held at 6-15 p.m. on Friday, 22nd November 1974, at the Tata Auditorium, Bombay House, Homi Mody Street, Bombay 1. Participants include **Mr. P. P. Bhat,** Hon. Secretary of the Foreign Exchange Dealers' Association of India, **Prof. K. K. Gajaria,** Head of the Department of Economics, Jai Hind College, and **Mr. U. S. Navani,** former Director of Publications, Reserve Bank of India.

You are cordially invited to attend with your friends.

M. R. Pai
Secretary

Bombay, 12th Nov. 1974.

Special course only for our members and student associates on "Effective Communications and Human Relations" by **Prof. K. K. Mehan,** *Professor of Management and Chairman (Consultancy) on 2nd December, 6 to 8 p.m. Ask for details.*

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

—EUGENE BLACK

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

—EUGENE BLACK

THE ROLE OF THE JUDICIARY IN PARLIAMENTARY DEMOCRACY*

by

M. C. Chagla

The role of the Judiciary in our parliamentary democracy is a unique and crucial one. Parliamentary democracy is rule by the people through their representatives elected to Parliament. In England, Parliament is supreme and sovereign. It does not only speak for the people, it decides for them. Its decisions are final and cannot be challenged by any authority. The Judiciary there must accept the laws as passed by Parliament—they cannot challenge their validity. Their role is comparatively a subsidiary one of interpreting the law and giving effect to it. Our Judiciary on the other hand, plays a major role which in a sense places it above Parliament. It does not merely interpret the laws passed by it, but it also decides their constitutionality. In our country, the Constitution is Supreme. And the Judiciary has been designated by the Constitution to keep

*This is the text of the ninth A. D. Shroff Memorial Lecture delivered in Bombay on 28th October, 1974. Mr. Chagla, eminent jurist, held with distinction many important public offices such as that of Chief Justice of Bombay, Ambassador to U. S. A., and Education Minister in Government of India.

Parliament within the bounds of the Constitution. If it oversteps it, the Judiciary can strike down the law. And there is no appeal from the Judgement of the Supreme Court. Its Judgement becomes the law of the land—unless Parliament acting under its amending power changes the law as declared by the Supreme Court.

It will be immediately noticed that vast and wide are the powers of the Supreme Court in this regard. Parliament may pass any law but it is the Supreme Court which is the ultimate arbiter of its validity. It would be erroneous to say that this gives a power of veto to the Supreme Court or constitutes it as a third chamber. The Supreme Court is only acting under the Constitution as indeed the Legislature or Executive is bound to do. One learned author has gone to the extent of suggesting that the Supreme Court in exercising its right of Judicial review is, in effect, legislating. I do not agree with this view. Legislation is quite a different process from the exercise of the Judicial function of considering the constitutionality of a law. The result may be that the view of the Supreme Court prevails over that of Parliament. But the Constitution has so willed it and has placed in the hands of the Judges a powerful weapon which can be wielded with consequences of infinite importance, both for the country and the nation.

The American Supreme Court has a similar power and our founding fathers preferred the American model to the British one with a wisdom and foresight, which,

particularly today, we can only appreciate and admire. In England, Parliament is elected by a small country and voters vote in small constituencies which makes it possible for the candidate and the voters constantly to come in contact. Parliament there has also inherited the traditions of centuries and acts with restraint and the party in power never uses its majority to ride rough-shod over the opposition. Because it is conscious of the fact that the opposition also represents a section of the people and at the next election, it may come into power. In our country, the position is quite different. The Congress from being a national organisation which won us our freedom suddenly became the party in power with no viable opposition to speak of. Unlimited power is a dangerous thing, more insidious than a heady wine. Because you can recover from intoxication caused by alcohol, but the intoxication caused by power may become a permanent state of alcoholism.

Further, the voters in Britain are literate and educated—here we have millions who are illiterate and although gifted with practical common sense, can be carried away by the tub-thumping orator or the millennium promised by the ideological fanatic. Therefore, without the power of Judicial review, we will be governed not by democracy, but by a one-party Government and that one party might resolve itself into the dictatorship of a single individual. The most dangerous dictatorship is one which is based on democratic process—on the forms and paraphernalia of

democracy—on general elections, on adult suffrage which ultimately throws up not a real representative Government but a dictator who masquerades as a democrat representing the people but is really carrying out his own whims and fancies however illogical they may be and however prejudicial to the country.

The other function of the Judiciary is the protection of the individual's rights against the ever expanding powers of Government. Our Government is tending day by day to become more and more monolithic. It possesses power and patronage in full and even extreme measure. Any opposition to its policies is either muted or silenced. The voice of dissent is either not heard or suppressed. This is really a negation of real democracy. For democracy postulates dispersal of power, the freedom to think and write what may be most unpalatable to Government. The citizen is helpless before such display of gargantuan power. The only check that the Constitution has provided to this runaway inflation of power is the Judiciary. It alone can safeguard the fundamental rights of the citizens. It alone can tell the Government—so far and no further. It alone can act like the angel with flaming swords guarding the citadel of human rights. Undoubtedly there has to be a balancing between the needs of society and the rights of the individual, and our Constitution rightly provides for reasonable restrictions on the freedoms it has guaranteed to the citizen. But in this balancing, the scales must tip in favour of the citizen. The state must prove that

there is a clear and present danger which would justify it in depriving the citizen of his rights.

Under the first amendment to the American Constitution, the right to freedom of speech and of the press and of assembly is absolute and cannot be abridged under any circumstances. That is why it was said that maximum personal freedom was the touchstone of a mature society. One American Judge has said that the freedoms guaranteed by the first amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. Justice Black has eloquently stated, "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion", and Mr. Justice Jackson has stated, "Legislation whose basis is economic wisdom can be redressed by the process of the ballot box or the pressure of opinion. But when the channels of opinion and of reasonable persuasion are corrupted or clogged, these political corrections can no longer be relied upon and the democratic system is threatened at its most vital point. In that event, the Court by intervening restores the processes of democratic Government, it does not disrupt them."

This is the star in the constitutional constellation by which the Judiciary should chart its course. Our right to freedom is enshrined in Article 19—the charter of seven freedoms. It is true that it has been considerably

curtailed by the recent Judgement of the Supreme Court enlarging the power of Parliament to amend the Constitution but one redeeming feature of that Judgement is that Parliament cannot alter the basic structure of the Constitution. If freedom is not the basis of democracy, what is ? It is like the savour of salt without which it is not salt. It is to be hoped that Parliament will not tamper with the seven freedoms and if it does, the Supreme Court will strike down such a law as affecting the basic structure of our Constitution.

It may be pointed out that the American Supreme Court during Earle Warren's Chief Justiceship extended the principle of personal liberty to innumerable questions that had so far remained untouched. To give a few instances—the tremendous advance in civil rights, the rights of the accused of being represented by Counsel and setting its face against convictions extracted by confessions, the prohibition against any minority being forced to take part in religious exercises—even when it came to salute the national flag; the liberal attitude on obscenity laws on the ground that a discerning public should be left to judge what is literature and what is trash except when the case is of obvious and unmitigated pornography. In this connection, I may quote from an article written by Earle Warren. "Our Judges are not monks or scientists, but participants in the living stream of our national life, steering the law between the dangers of rigidity on the one hand and formlessness on the other. Our system faces no theoretical dilemma but a

single continuous problem how to apply to ever changing conditions the never changing principles of freedom".

In one sense, the Judiciary has a creative role to play. Justice Douglas has gone to the length of saying that the Judiciary is in a high sense the guardian of the conscience of the people as well as of the law of land. The conscience of the people is not always reflected in legislation. Without doing offence to the doctrine of Judicial restraint, it can by its judgement awaken the conscience of the people to the evils in Society which are crying out for a remedy and quicken the rate of progress where social legislation is tardy or ineffective.

If freedom as embodied is a star of first magnitude in the constitutional constellation, the Rule of Law is also a star of magnitude if not possessing the same brilliance as the former. The Rule of Law emerges from Article 14 of the Constitution which prohibits the state from denying to any person equality before the law or the equal protection of the laws. Therefore, in the eye of the Constitution all citizens are equal and have equal rights. No discrimination is permitted as between citizen and citizen and no citizen is branded as a second class citizen or suffers from any disqualification because of his caste, community or sex. Even the lowest of the land can aspire to become the President of India. This represents the triumph of secularism which is one of the most important pillars on which the edifice of our Constitution stands.

But you have also to read in Article 14 the provision that our country is governed by laws and not by men. No one, however powerful, can defy or refuse to give obedience to the Constitution and the laws of the land. In a recent historic Judgement, our Supreme Court laid down that our President is not above the Constitution. His oath requires him to preserve, protect and defend the Constitution. The U.S. Supreme Court has equally in Nixon's case denied executive immunity to the President from obeying subpoenas legitimately served upon him. In an earlier case, the U.S. Supreme Court set aside the order of President Truman to seize the steel Mills to avert a strike during the Korean War. Truman relied on the aggregate of his powers as Chief Executive and Commander-in-Chief. The Court held that the order was not authorised by law.

The Rule of Law also requires that law must be administered fairly. The standard of "fairness" has to be applied to all executive actions. Where rights are taken away, the Court insists that the party affected must be given notice and should be heard.

Chief Justice Warren once confessed that when he heard cases affecting the rights of citizens, the question he always asked himself was "Is it fair?" Our Judges may well emulate the learned Chief Justice. Legal technicalities must take a second place before the paramount consideration of fairness. It is at the heart of Equity if not of law and if Law is not tempered by equity, then it becomes

a barren soulless ritual, a formality which fails to take into consideration the injury a decision might cause or fail to promote the remedy which the law itself intended. One learned author has opined that the Judicial function in representing the rule of law is best discharged when the Judge realises that he is on the Bench to protect the helpless and oppressed and uphold the values of free thought, free utterance and fairplay.

It is a mere truism to say that if the Judiciary is to be the custodian of the rights of citizens, it must inspire the confidence of the public. It must be independent and impartial. It must not call any one its master nor should any one be allowed to call it its servant. It must assign to the waste paper basket any directions it may receive even from the President or the Prime Minister. Every Judge before he comes to the Bench has a personal philosophy based on what Holmes called the inarticulate major premise. He may believe in a certain ideology. He may believe in communism, socialism or the tenets of the Maha Sabha or the Muslim League. He must leave all these behind and forget them. The only scripture he must consult and the only Bible he must revere is the Constitution. His philosophy must be the philosophy which is to be found in the Preamble of the Constitution. That must be his friend, philosopher and guide, the light which must illumine his years on the Bench. The Courts are not a department of Government. They are an authority coordinate with the Legislature and the Executive. Even Parliament, however wide and vast its

powers, can only function under the Constitution. Even if legislation is passed by an overwhelming majority and Parliament has expressed its clear intention in no unequivocal terms, the legislation can be tested on the anvil of Judicial review and if it fails the test, Parliament must submit to the decision of the Court. It is a mistake to call this a confrontation between Parliament and the Judiciary. Each is discharging its duty assigned to it by the Constitution. If we have faith in our Constitution, we should call it a collaboration between two coordinate authorities rather than confrontation.

Our judiciary down the years has enjoyed a reputation second to none in the Judicial world. We have produced Judges of great eminence, of great learning, of great humanity who have enriched the pages of the Law Reports. Their independence and impartiality has never been doubted or suspect. Like a clap of thunder in a clear night, the atmosphere has changed. For the first time in the history of Judicial administration of our country, Government has publicly and officially proclaimed a policy which if given effect to, will destroy the independence of the Judiciary and make it not impartial, but partisan, and render the Judges henchmen of those in authority.

I do not want to go into the question of the supersession of the three Judges of the Supreme Court in any detail. The facts are well known and the matter has been debated from a hundred platforms and the action

of Government has been universally condemned—except by those who have eyes and will not see and ears and will not hear or by those who are committed body and soul to Government or by those who have gained or hope to gain by this policy of Government. But human memory is notoriously short and it is necessary to recapitulate briefly the highlights of this sorry and sordid episode. Chief Justice Sikri's term of office was coming to an end and he was never consulted about his proposed successor. He came to know when the name was announced on the radio like any other man in the street. The Judges superseded were also never informed. So important an event as the appointment of the Chief Justice of India was manipulated and presented as a *fait accompli* in the utmost secrecy, so that there should be no time for the Bar or the public to protest against so egregious an action. A similar action was intended at the time of Mr. Justice Shah, but it was foiled because the Bar and the Bench protested strongly when it came to know about it. The convention of appointing the seniormost Judge to succeed as Chief Justice never departed from in the past was callously disregarded without any justification although the seniormost Judge was respected by the Bar as one of the ablest incumbents of the Bench. The three Judges superseded had all voted against the Government in the well-known Fundamental Rights case to which Government attached the greatest importance and treated it as a prestigious issue. The mere narration of these facts is sufficient to satisfy any impartial Judge that what happened was a calculated and preconceived plot on the

part of Government to undermine if not destroy the independence of the Judiciary.

The Official explanation on the floor of Lok Sabha when there was a pained and shocked outcry from Bars all over India and from the general and thinking public, made matters worse. Government claimed an absolute right to appoint such Judge as they thought proper, and they left no doubt as to who they thought were proper Judges. A Judge must be forward looking; a Judge must be conscious of any change of wind; he must be in tune with the Congress policy. It need hardly be said that if this was going to be the policy in future for the appointment of Judges, every Judge who thought more of his preferment and promotion than his Judicial reputation or honesty of purpose would try to give satisfaction to Government by looking forward as far as he could from his chair on the Bench—the clearer the vision the greater the prospects. He would study the political weather report every morning, which way the political wind was blowing and he would try to decipher what the Congress policy was at any given point of time—a task which even political scientists would find difficult to accomplish.

A deadly blow had been dealt at the one institution in India which had refused to conform to Government's views, which time and again had told Government in no unmistakable terms that it was wrong and which had courageously and steadfastly protected the rights of citizens against the ever-increasing inroads of

Government and Government-controlled Parliament, upon a free society which is another name for democracy in contradistinction to a captive and totalitarian society. But the Bar reacted gloriously. It was their finest hour and Government was made to realise that public opinion will not tolerate the destruction of one of the most important pillars of the Constitution.

The Bar will always support an independent Judiciary, but in the ultimate analysis, it will depend upon the Judiciary itself. I have no doubt that our Judges with the glorious traditions of the Indian Judiciary which have been built up in the course of a century, will not succumb to the threats, blandishments or the temptations which Government will undoubtedly hold out.

I may end this part of my lecture by a quotation from Lord Bryce's modern democracies :

> "There is no better test of the excellence of a Government than the efficiency of the Judicial system. If the law is dishonestly administered, the salt has lost savour. If the lamp of justice goes out in darkness, how great is the darkness".

There are two or three provisions in the Constitution relating to the Judiciary to which I wish to advert. The first and foremost is the salary of High Court Judges. It is fixed at Rs. 3,500/-. It can neither be reduced nor increased without an amendment of the Constitution. By a strange irony, the provision regarding the salary of the

Judges was inserted in the Constitution in order to give security to the Judges. It has now turned out that the salary has become frozen and instead of security, it has lead to penury. The Judges of the Bombay High Court, 100 years ago, used to draw a salary of Rs. 4,000/- —today, it is Rs. 3,500/-. In those halcyon days of old the Judges hardly paid any tax and the cost of living was about 10 times less and the Rupee was worth a rupee and not 30 paise as at present (It might have gone down further since I wrote these lines). The prospects at the Bar are much brighter. There are more Courts and Tribunals to practise before than there were when I was a Junior. And the rewards of success are most glittering. The result has been that every Chief Justice finds it almost impossible to persuade a young and able lawyer to accept a seat on the Bench. Perforce he has to depend for the strength of the Bench on District Judges. I have nothing against them—some have proved to be very good Judges. But I cannot conceive of the High Court as a glorified District Court. Unless the Bar is fully represented on the Bench, the whole character and atmosphere of the High Court will change. A practising lawyer brings to the Bench something which a District Judge, however able, can never do.

We are told that now the highest Government Officer in the Civil Services does not draw more than Rs. 3,500/-. This is an entirely fallacious argument. There must be some relationship between income at the Bar and the salary you pay to your Judges. It is true that every good

lawyer, when he accepts a Judgeship, must make a sacrifice in the public interest. But the sacrifice must be reasonable—not such as to break the back of the person making it.

I have often suggested that if it is not possible to increase their salaries (for it would almost be impossible for a constitutional amendment to go through Parliament as it is at present constituted with its antipathy towards the Judiciary and its ideological outlook) there are several —what I might call—peripheral benefits that the Judge can be given so as to give him some relief. Consider such benefits which a member of the Civil Service enjoys or for the matter of that, a Minister or a Member of Parliament, even though on paper, their salary is the same or much less than that of the Judge.

The second important matter which requires an immediate amendment of the Constitution is to place the Judge in the same position as the Auditor-General. The latter cannot hold any office under the Government or under the Government of any State after retirement. This is a salutary provision to ensure the utmost impartiality and integrity in an office of high responsibility. Does a Judge hold an office which is less responsible and which calls for less independence or impartiality? It is sad to see the number of Judges who pay Court to Ministers to get appointed to some Tribunal after retirement—and it is sadder to see how many tribunals are manned by ex-Judges. There is one Judge I know of who

has never ceased to be in charge of a Tribunal of some sort or another ever since his retirement which was a very long time ago. Only the cruel and relentless hand of death can remove him from a Tribunal. The consequences of this policy of Government have been highly prejudicial to the fair name of the Judiciary. Short time before retirement, every Judgement of a Judge, however honest, becomes suspect. If it is in favour of Government, and rightly so, he is accused of pleasing those who have patronage to bestow. And some Judges I know go out of their way to decide against Government in order to assert their independence, which is equally unfortunate.

Government, in defence of their policy, say that they want judicial talent for most of their tribunals. The solution is very simple; take a Sitting Judge and, if necessary, fill up his temporary vacancy by a fresh appointment. The other advantage of this solution will be that it would be the Chief Justice who would recommend the Judge for the Tribunal. Today, it is Government who bestow favours upon those whom they like or who have given them satisfaction by their Judgements.

What about the right to practice? That stands on an entirely different footing. I may have the right to practice, but that does not mean that I will enjoy a practice. That would depend upon my own ability and the confidence that my clients may have in me. Government cannot dictate to a client which Counsel he should brief, except in Government cases, where there is considerable abuse

in the preparation of a panel of Government Advocates. But no system can be perfect and even Government wants able lawyers to fight their cases.

Government has claimed the exclusive right and privilege of appointing Judges and Chief Justices of High Courts, and Supreme Court. Even in the U.S.A. where the President appoints the Federal Judges it is with the advice and consent of the Senate and the President before submitting his name to the Senate usually consults Bar Associations and leading jurists.

In India, our constitution only provides for consultation in one of the modes provided by the Constitution. But consultation more often than not is an empty formality. For all practical purposes, the power to appoint is absolute in the hands of Government. After Government has announced its policy as stated before with regard to the qualifications required for appointment as a judge this absolutism has become even more dangerous and should no longer be permitted and the constitution should be amended to entrust the appointment of Judges to an independent authority.

One suggestion is that the concurrence of the Chief Justice should be necessary in the case of every appointment of a Judge of the High Court or Supreme Court. In the case of appointment of the Chief Justice of a High Court, the concurrence of Chief Justice of India should be necessary and in the case of the appointment

of the Chief Justice of India the concurrence of the retiring Chief Justice should be required. Another suggestion is the constitution of a high powered judicial Council whose concurrence would have to be sought. The council should consist of retired chief justices not holding any office of profit under the state.

It is also necessary that the initiative for the appointment of a Judge should come from the Chief Justice and not Government. This will empty the Darbar Halls of some Ministers and stop unnecessary canvassing by candidates to this high office.

The last question I will deal with is the appointment of *ad hoc* Judges. The provision has been made for such appointment to seek a sudden contingency. But what was intended as a contingency has tended to become a settled practice. The retiring age of every Judge is known—he cannot hide it as a woman is supposed to hide hers. Why does not Government make up its mind to fill up a vacancy long before it occurs, so that the strength of the Court is not reduced even for a short time ? Today, the vacancy is not filled up when it occurs and the retiring Judge is very often asked to continue as an *ad hoc* Judge. This is a pernicious practice and contrary to the spirit of the Constitution. In effect, it extends the retiring age of a Judge. If a retired Judge continues as an *ad hoc* Judge, then he retires not at the point of time fixed by the Constitution but after an indefinite period determined by the Chief Justice. It may

not be charitable to say so, but it is not far from the truth that Ministers like candidates for Judgeships to pay court to them, to attend their Darbar, dangle the glittering prize before them, to impress them with their power and authority and finally when a decision has reluctantly to be taken, appoint the favoured one.

In conclusion, I must stress the importance of public opinion as far as the independence of the Judiciary is concerned. Whoever believes in democracy must believe in the ultimate triumph of public opinion, if it is strong, united and fearless. If it is the people who have to govern the country, then the will of the people can only be manifested through public opinion. Recently, it has toppled (to use an expression which has now become part of the political vocabulary of our country) the President of the United States—than whom there is no more powerful person in the world with the possible exception (and I must mention the exception) of our Prime Minister. If it can do that it can surely condemn back-sliding Judges and see that they remain on the right track, true to themselves, true to their high office and loyal to the Constitution. It can also prevent Government from pursuing any policy or taking any action which will undermine the prestige, the dignity and independence of the Judges.

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

A. D. SHROFF
1899–1965

A. D. Shroff was a champion of free enterprise and a great leader of business and industry, and an economist whose predictions have proved right over the years.

He 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.

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, and his range of interest covered insurance, radio, investment, shipping, banking, and a number of other industries.

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.

In 1956, he started the Forum of Free Enterprise which has stimulated public thinking in the country on economic affairs.

"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.

Have you joined the Forum?

The Forum of Free Enterprise is a non-political and non-partisan organisation, started in 1956, to educate public opinion in India on free enterprise and its close relationship with the democratic way of life. The Forum seeks to stimulate public thinking on vital economic problems of the day through booklets and leaflets, meetings, essay competitions, and other means as befit a democratic society.

Membership is open to all who agree with the Manifesto of the Forum. Annual membership fee is Rs. 15/- (entrance fee, Rs. 10/-) and Associate Membership fee, Rs. 7/- only (entrance fee, Rs. 5/-). College students can get our booklets and leaflets by becoming Student Associates on payment of Rs. 3/- only. (No entrance fee).

Write for further particulars (state whether Membership or Student Associateship) to the Secretary, Forum of Free Enterprise, 235, Dr. Dadabhai Naoroji Road, Post Box No. 48-A, Bombay-400 001.

Published by M. R. PAI for the Forum of Free Enterprise
235, Dr. Dadabhai Naoroji Road, Bombay-400 001,
and printed at TATA PRESS Ltd., 414, Veer Savarkar Marg,
Prabhadevi, Bombay 400 025.

20/Nov./1974