

A JUDICIARY MADE TO MEASURE

A collection of some of the nationwide protests against the supersession of Justices Shelat, Hegde and Grover for the office of the Chief Justice of India

Edited by N. A. Palkhivala

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1. An Earnest Appeal

Jayaprakash Narayan

(Published in the Indian Express in the Issue of May 16, 1973)

So much has been said and written about the recent judgement of the Supreme Court and appointment of the new Chief Justice, that there was no need for me to add to the cacophony. But as an old freedom-fighter, who even after Independence has tried to serve his country and his people to the best of his ability, I have been so deeply distressed and worried by the recent happenings, that I cannot restrain myself from sharing my anxieties with my countrymen, and particularly with fellow freedom-fighters especially those of the ruling party.

Like millions of those who had fought and suffered for the country's freedom I too had a golden vision of independent India. Today when I compare the reality with that vision I am filled with sadness. And when I ponder over the future that the recent events portend, my heart sinks. I cannot believe that it can be otherwise with my fellow freedom-fighters.

It is in this belief that I am venturing to write these lines. This is not meant to be a polemical or critical piece, but is an earnest appeal to the Prime Minister and those Congressmen who had publicly expressed their faith in democracy and socialism.

In the recent past whenever I happened to have expressed dissent or critical judgements, I have been roundly denounced as anti-Indiraji, a spokesman of right reaction and worse. Generally speaking, my detractors have been from the same quarters as have made it their business for the past several decades not to miss an opportunity to attack and revile me.

Lately, these quarters have behaved as if they alone are the true friends and supporters of the Prime Minister and enjoy her confidence. The result is that what is said gets lost in the din of declamation, rather than being dispassionately considered.

I, therefore, wish to make it clear, though I regret that it should at all have been necessary to do so, that I have no reason to be anti-Indiraji. On the contrary, I have every reason to wish her well and see her march from success to success.

Whatever I have said in the past and may say now and in the future was, and will be, motivated by my concern for the country and its future. The school in which I have grown up has taught me not to let personal affection and regard stand in the way of performance of duty. My professional detractors will no doubt brush this all aside. But I do hope that the Prime Minister and those Congressmen to whom these words are addressed will give some thought to this appeal.

My appeal is on two counts: (a) the fundamental rights of the citizen; and (b) the independence of the judiciary. It appears from the analyses made by knowledgeable persons that a majority of the judges of the Supreme Court has ruled that the citizens' fundamental rights and freedom, as laid down in the Constitution, can be not only amended by also abrogated by Parliament.

The Constitution unfortunately lumps together right to property with such fundamental rights as those of freedom of speech and expression, freedom and association and movement, etc. The so-called confrontation between the executive and the judiciary that has taken place so far has in each case been concerned with rights to property.

Property is a social institution and in a democracy it must serve the social good as conceived of by the prescribed democratic will of the people and realized in a democratic manner. As such, private ownership of property of certain kinds can be limited, regulated, even extinguished, if necessary.

But in a democracy, while the fundamental rights to freedom may be abridged and regulated, they cannot be abrogated though they may be suspended for temporary periods of national emergency, war, and in such other circumstances as are listed in the Constitution.

If those Congressmen who are committed to democracy are sincere in their faith and are vigilant enough, it is their duty to ensure that the present or future Parliament does not take advantage of the Supreme Court's judgement to extinguish the fundamental freedom of the citizen. No doubt the Prime Minister and other spokesmen of her party have from time to time assured the people that they have no idea whatever to do this. But mere assurances are no safeguard against the misuse of power. It is necessary that the assurance is written into the Constitution in such form as may be appropriate.

Some Congressmen may plead that their parallel commitment to socialism is as important as their commitment to democracy, and, therefore, it may become necessary sometimes to deprive the people of their fundamental freedoms of speech, expression, association and movement, etc., in order to establish socialism. I hope that on second thoughts, such friends will realise the fallacy, nay, the mischief of this argument. This is a slippery path and will end up not in democratic socialism but in dictatorial communism.

The repeatedly proclaimed of the democratic socialists has been to establish socialism by democratic means. But if establishment of socialism, necessitates the abrogation of the people's fundamental freedom, what remains of democratic means? It should be realized that the extinction of these rights might lead to the extinction of free platform and Press, of Opposition parties, of all trade unions, except the official ones, of all such institutions and organizations as do not agree with the ruling party.

I am not suggesting that there is an immediate danger of all this happening. I am merely pointing out the logic of unlimited power. Therefore, my earnest appeal to the Prime Minister and her democratic socialist colleagues is to rise above partisan considerations. Look into the future and assure the present and coming generations that their liberties would remain intact, their miseries would be brought to an end and that they would be enabled to live in a free, just and equal society.

As for the second part of my appeal, I take my stand on the principle that the Congress and its critics are agreed upon, namely, the principle of the independence of the judiciary. There is clearly a national consensus on this question. That being so, I ask the Prime Minister and her colleagues if the manner of appointing the new Chief Justice of the Supreme Court upholds this universally accepted principle.

I do not think any fair-minded person will agree that it does. Parenthetically, it is necessary to emphasise that nothing said here casts any reflection whatever on the integrity and ability of the present Chief Justice. What is being discussed is not any personality, but a principle and its faithful implementation.

I am sorry to say that all that has been said by the Prime Minister and her colleagues to justify their action is utterly unconvincing. Much of it is also misleading. Competent writers have argued all this out in the Press.

I am not competent to suggest what procedure should be followed. The Constitution itself lays down a procedure, namely, the same as in the case of the other judges of the court. There was also a convention which had been followed for the past 25 years. The Law Commission had recommended a procedure. The Government claims to have followed that, but it has done so only partially, disregarding other essential criteria laid down. I am sure other suitable procedures can be devised.

The simple fact is that if the appointment of the Chief Justice of India remains entirely in the hands of the Prime Minister of India, as has been the case in the present instance, then the highest judicial institutions of this country cannot but become a creature of the Government of the day.

Therefore, my appeal to the Prime Minister is that she should appoint a parliamentary committee, representative of all the parties in Parliament, to go into this vital question and make recommendations to Parliament. The committee naturally should have power to consult public opinion, including the opinion of the Bar and of eminent jurists. The procedure evolved and recommended should also apply *mutatis mutandis* to the High Courts.

In sum, unless constitutional safeguards are provided to retrain Parliament from abrogating the fundamental freedoms of the citizens except suspending them for temporary periods and in clearly specified circumstances, and unless the independence of the judiciary is credibly assured, the very foundations of our democracy will be in danger of being totally destroyed.

2. Undermining of Judicial Independence

M. C. Setalvad

(CHAIRMAN OF THE FIRST LAW COMMISSION AND FORMER ATTORNEY-GENERAL OF INDIA)

We are meeting on a very unique and important occasion. Unfortunately, a member of the Bombay Bar has been used, as it were, as an instrument in bringing about a change in the manner of appointing the Chief Justice of India. That change was initially put forward on behalf of the Government as being motivated by a desire to follow what the Law Commission, over which I had the honour to preside, had recommended as far back as 1958. Well, that recommendation, according to the Government, was carefully laid in cold storage all these years. But now case the occasion for the Government to use that recommendation-and use it, in my view, not honestly but dishonestly. Those who have been following the controversy and looking at the newspapers in connection with it know by now what the Law Commission had recommended. It was a totally different recommendation. It was a recommendation to establish a convention that seniority will not necessarily prevail in the selection of the Chief Justice and that such a convention should be

well established so that the puisne judges may well understand that if some of them or all of them are passed over, it is not because of their want of merit and status but because of their want of capacity in the circumstances to act as Chief Justice. No such convention was ever established as suggested by the Law Commission. And straightway when it suited the Government, it started, not establishment that convention, taking the public or the Bar or the judges into their confidence, but making cryptically an appointment superseding the senior judges. That shows how completely dishonest was the initial statement of the Law Minister when he announced the change and tried to defend it in the Lok Sabha.

However, now the Government is not making any bones about its true intentions in bringing about this change. Mr. Kumaramangalam, a senior member of the Bar, evidently had good deal to do with this change. I have no inside information, but I am judging from the vehemence and the candour with which he defended the action in the Lok Sabha. And he boldly and categorically asserted in the Lok Sabha that it was the Government's right and privilege under the Constitution to select for the office of the Chief Justice a person who is, in his words, "forward-looking" and not "backward-looking", a person who, according to him, shares the philosophy of the Government not any other philosophy. That really is the reason for the supersession of the three senior judges, and not the reason which the Law Commission gave; and I am glad the true reason has now been honestly owned by the spokesman of the Government.

In order that those of you who are not lawyers-and I see many among you who are not lawyers-may appreciate the position, let us understand what his statement means, in effect and in practice. It means that when it comes to the appointment of the Chief Justice the Government will select a person who shall uphold the Government's view of the Constitution, not the philosophy in fact underlying the Constitution but the Government's understanding of that philosophy. We all know that when a judge takes office, including the Chief Justice, he takes on oath of office and his oath pledges him, among other things, to decide cases in accordance with the Constitution. Now if he looks at the Constitution and feels that its interpretation, is according to him, in a particular direction or it has a particular meaning, he has not to give that direction or meaning to the words of the Constitution. He has to apply to the words of the Constitution, contrary to his own understanding, the philosophy of the Government.

Let us analyse what the philosophy of the Government would, in ordinary practice, mean. The philosophy of the Government would mean the philosophy of the ruling party. Today it may be the philosophy of the ruling Congress, tomorrow it may be the philosophy of another party-it may be the Jan Sangh, it may be the Swatantra. Therefore, the judge or the Chief Justice has to keep track, when he is sitting on the Bench, in interpreting the Constitution, not of the language and the words of the Constitution, but of the philosophy of the ruling party which may change from time to time. So, you have not to have an impartial Chief Justice but a judge or a Chief Justice who will bear in mind what, in effect, the Government thinks the Constitution means. If the judge thinks the Constitution means. If the judge thinks the contrary, he is not sufficiently "forward-looking"; he is "backward-looking", and must be discarded for the office of the Chief Justice.

And the mischief does not end there. It goes further. Though the observations which were made in the Lok Sabha by Mr. Kumaramangalam refer to the office of the Chief Justice, they

would apply all the way down to all judicial appointments. Every judge of the Supreme Court when making a decision in which Government policy is in question will have to think of his prospects of being appointed the Chief Justice and bear in mind what the philosophy of the Government of the day is, if he wants to be in good favour with the Government of the day is, if he wants to be in good favour with the Government in order to earn his appointment as the Chief Justice. Nay, it will travel down further. Take the judges of the High Court. Naturally and rightly they all aspire, as soon as they grow senior, to be selected for the highest Court in the land. But they must bear in mind that in order to be so selected they must also interpret the Constitution, not as they think it requires to be interpreted, but according to the philosophy of the Government in power at the centre for the time being.

What I have said, ladies and gentlemen, is enough to show to you that the doctrine laid down so openly by Mr. Kumaramangalam is clearly a doctrine subversive of the independence of the judiciary. I hope all citizens, in whatever capacity they may be placed, will do their utmost to resist this attempt at naked arbitrary exercise of power in the appointment of the Chief Justice by the Government.

3. Unjustified Departure from Settled Convention

M. Hidayatullah

(FORMER CHIEF JUSTICE OF INDIA)

I deem it a great privilege indeed to have been asked this evening to address this large and distinguished audience on the subject of the Supreme Court and the Indian Judiciary. Our Chairman this evening has given us a very good start by telling you the background in which this meeting is taking place. I am relieved of the task of detailing before you once again the events which have been agitating the whole of India for the last nine days.

I was in Delhi when this happened. I am very friendly and I still keep friendly relations with all my former colleagues. I did not know that such an event was happening. Indeed, a day after my arrival on the 21st April, I had Mr. Justice Ray and Mr. Justice Reddy over to tea with me and we talked of this, that and the other, but there was no mention about this event. I was naturally very anxious to attend the swearing-in ceremony of my brother Shelat, whom I regard as one of the finest judges with whom I have sat on the Bench-and I can tell you that I have sat with over 50 to 60 judges including 5 foreign judges. There is nothing wanting in him as a judge and I was hoping he would be fully fit to be accepted as the Chief Justice, especially as he had only a term during the vacation. I used to joke with him and I used to call him 'Mr. Vacation Chief Justice'. But it was not to be. But that is not all. Not only he, but after him two others, namely Mr. Justice Hegde and Mr. Justice Grover, two other very fine judges, whom I certify to be as good judges as any one can find in India, were also passed over.

It was on the evening of the 23rd when I rang up Mr. Justice Ray, with whom I am very friendly, and asked him to convey to Mr. Justice Shelat my request that at the swearing-in ceremony I would like to go as his personal guest. Mr. Justice Ray said to me on the phone "You

had better make the request yourself." I was a little puzzled by this. So I rang up Mr. Justice Shelat and I said "Hello, Shelat, what about taking me to your swearing-in ceremony?" He said "Aren't you a little before time? Anything might happen!" And I said "You are right." I couldn't say more. Well, I felt something peculiar in the air because, after all, the announcement should come in time. It was the same on two other previous occasions. And, therefore, I waited with bated breath to see how this thing would pan out. Curiously enough, I learnt of the supersession of these three judges and the appointment of Mr. Justice Ray at 11 o'clock on the 25th. The news came to me from Calcutta. It is a most remarkable thing the announcement took place at 3.30 in the afternoon of that day and I knew about it all 11 o'clock in the morning! I also had it confirmed by Mr. Justice Ray at 5 o'clock. Well, there it was. There was nothing else to do.

The Judges who were superseded did very well in laying down their office forthwith. I am happy to find my brother Shah here, and will recall that when he succeeded me, rumours were afloat that an outsider was being brought into the Supreme Court. I put it to my colleagues what would it mean. They said, with one exception, "We will all put our resignations in your hands". I could only tell them-and my brother Shah is here-that I would add mine even if there was one day left of my service.

Well, today there has been a lot of writing and speaking on this question and there has been a lot of justification as also criticism of what has happened. The justification takes a peculiar shape. The first point is that the Law Commission recommended that you should not devote any attention to seniority but consider some other qualifications. Well, we are very fortunate that two of the members of the Law Commission are present this evening. And the others who are alive have indicated what the report actually recommended. Mr. Setalvad has explained it to you and I leave it there.

The next criticism against the judges of the Supreme Court was that there was no leadership in the Court. Indeed, one of my visitors said that there were 11 judgements out of 13 judges and this does not show that there has been any leadership. Well, examine the judgements. The first five, including one from the lower rank, gave three judgements. Judges below Mr. Justice Ray and including him gave eight. It seems that if there was room for leadership, it would be in the lower panel and not in the higher panel.

It is no use saying that the judges write too many judgements. It is not known that these big Benches are not constituted for the purpose of having more votes. The real purpose of a large Bench, as originally understood, was that every judge would state the law as he understood it so that future judges would pick out the judgment with was the most appropriate and satisfying. If you read the Law Reports, you will find Justice Frankfurter often bemoaning the fact that the pressure of work did not leave him the opportunity to perform his function as a member of the Bench, viz. writing his own opinion separately. Even in the House of Lords, when 5 or 7 judges speak, they often make as many speeches as there are judges. Now, because of circulation of speeches on paper, they have started signing the speeches of other judges. It is not because they are not able to do so but because they do not wish to draft a separate opinion. It is wrong to think in essence that we, when we sit on a large Bench, are supposed to toe the line of some other judge-either the Chief Justice or a senior judge-and that only two decisions are expected of the Court. There are little bits of differences which the judge wants to point out and leave it to

posterity to determine who was right, he or the other colleagues of his who took the opposite or a different view. This being the position, I do not think that there is any justification in the charge that the judges did not show any leadership. I hope now they will show leadership because if all judges are of the same opinion there would be no difficulty in writing a single judgement, and that will bring me to a later point with which I shall deal in its own place.

Then it is said in justification of the appointment that the practice in other foreign countries is to choose somebody who is not necessarily the seniormost judge. Instances are cited of the English Courts, the American Courts, the Australian Courts and the Canadian Courts. It is not realised that in England, normally the office is offered to the Attorney-General, and that has always been the case unless the Attorney-General declines to accept it. It was only at the time of Manningham-Buller, when Lord Goddard was the Chief Justice, that Lord Goddard, so we heard, would not go because he did not like Manningham-Buller to succeed him as Chief Justice. He became 82 and was very old; and continued to be the Chief Justice till Manningham-Buller said, "For heaven's sake leave me out, but you go!" Later, Manningham-Buller became Viscount Dilhorne and the Lord Chancellor. So, the settled practice is there as they follow it, except on occasions such as I have mentioned. In Australia, the Chief Justiceship ordinarily goes either to the Attorney-General, if he is willing to take it, as Barwick has taken it, or to the youngest judge on the Bench. The idea is not to choose anybody who would be there for a short time, but to have a Chief Justice who would be in the Court for a sufficient length of time. And this practice is normally followed. It is no use saying that a judge was picked up at the fifth place. He would be, because they follow their own convention and tradition and give effect to it. In Canada, the position is very different. There are provinces which are English in origin and others which are French in origin. And the claims of the English provinces and the claims of the French provinces have to be equated so that Canada may continue together; and sometimes one and sometimes the other is chosen. But it has no relation to the seniority of the judge who is picked out. Therefore, there also a tradition is followed.

Now in India, we began 25 years ago under an independent Constitution. What did we do? Mr. Ray is the 14th Chief Justice, I was the 11th, my brother Shah was the 12th and thereafter came Sikri. Throughout this long change-over, there was only one instance in which a senior judge was passed over, and that was Justice Imam who had had a succession of strokes, resulting in deprivation of his speech, and who could not even finish a sentence which he began because his speech centres were affected. And I am sure his memory and his powers of concentration were also gone. So there was justification, then, in not entrusting to him the work of the Court which requires a great amount of labour and industry, apart from deciding cases. That was a stray incident. That apart, we had Justice Sarkar for a short time and my brother Shah for a short time. And there was no question raised at that time that because they were for short durations they should not get in as Chief Justice. Now what Justice Shelat says is very much the same. And there was no justification in passing him over. Therefore, we will have to look for reasons elsewhere. There was again the case of Mr. Justice Hegde who had a year to serve. Then there was Mr. Justice Grover who would have been there longer than Mr. Justice Ray. Therefore, any contention of short duration for long duration falls to the ground.

Then comes the last of the things, which has come out in the papers from Mr. Kumaramangalam. That has certainly let the cat out of the bag – the bag must be of red colour, I

think! He said that we chose a Chief Justice who is not a “backward-looking” man, but a “forward-looking” man. Well, I am afraid that if this goes on, the men who will be chosen will be people not forward-looking but looking forward! It used to be said in the olden days that a puisne judge was very anxious to trip up the heels of the puisne judge before him. And, in England, the judges were so much after the king and his patronage that they were known as “judges under the throne” or “lions under the throne”. Well, if “lions under the throne” are to be made Chief Justices, then, of course, there will be great justification for what has been done. I am afraid, in our country, with its vast population, numerous communities and various interests, and many suspicious, and many advantages to some people, it would be best if the old tradition had been followed so that the judiciary would have continued, in the eyes of the public, without any suspicion. Today, the whole of the judiciary is suspect because it is now accepted in some quarters that some judge would want to trim his opinions so as to be able to get on. So that judges, as I said, would want to look forward to something coming to them and, therefore, modulate their decisions to the exigencies of their situation and not to the situation of the country and the Court.

I do not see why Mr. Mohan Kumaramangalam says that there is only one social philosophy. I don't think he could have read the Constitution carefully. Our Constitution is an amalgam of many social philosophies balanced together so that they can operate, as the occasion arises, in different fields. And, therefore, to say that there is only one social philosophy, which probably Mr. Mohan Kumaramangalam understands, is to distort the Constitution beyond recognition. I have had to deal with this Constitution even since it was promulgated. From 1950 to 1970 I read every part of it and not once, not twice, but probably a hundred times. Every time I read the Constitution, I see a new meaning; and it is this which has made the American Constitution—which is so small that it can be written almost on a folio-prosper, not wither, because the judges have put new life into it as time passed.

It may be that for the moment the judges may be in error. I don't say that my brother Shah or myself were right in the Golaknath case. We might have been very conceivably wrong. Well, our mistake has been pointed out. There is an end of the matter. If the judges of the Supreme Court today say that we were wrong, we say that they are right because we also, as very disciplined people, accept the decisions of the Court given for the time being. There is a Latin maxim which says that anything which is decided must be taken to be correctly decided. While our judgement stood, it was correctly decided. While this judgement stand, it is correctly decided. It is not that the judgements of the Supreme Court are like the edicts of olden times carved on stone. They can be altered, they can be overruled; they have been overruled over and over again. And in America they got so disturbed over this overruling that they began overruling a judgment sub silentio, that is to say, without mentioning the earlier case they would state their new view.

I am sorry I am taking too much time; so I will conclude. The judiciary, therefore, is a little rattled. I think it is also in a little peril-peril not in its entirety, but at the hands of designing and scheming people who will use this method of getting ahead of the others. It is all right that we have eminent judges in the Supreme Court who will be able to give guidance to the country again. And I have great confidence in the judiciary of India, right down to the lowest judge, that this sort of thing will not win him over and that he will do exactly what he feels is right in the

case before him. If that were so, we need not shed tears over what has happened and we can look forward-not be forward looking, but look forward-to an era which will be as good as the one which has gone before.

4. Improper Exercise of Executive Power

J.C. Shah

(FORMER CHIEF JUSTICE OF INDIA)

Nine days ago, a remarkable piece of political skullduggery was perpetrated in this country. I have tried to think, and think many times over, whether there is any justification for what has been done. And with the best efforts on my part, discussing the matter with various people, I have come to the conclusion that there is no reasonable ground which could have persuaded the Government to take the action they have taken. Before the Parliament, the apologists for the act which has been done have advanced many grounds.

First and foremost, they say, it is the privilege of the Government of the day to appoint the Chief Justice. Why only the Chief Justice, even the judges. But you will agree with me, and most lawyers will say, that when power is conferred upon the executive or any other authority, it is intended to be exercised in good faith. If it is not done in good faith, then it is no real exercise of power. To say that there is power vested in the executive to appoint a Chief Justice means nothing whatever. Has the power been exercised in good faith? The circumstances which have transpired in quick succession do not lead to this conclusion. I wish I were wrong in thinking that the power was exercised not honestly, not bona fide, but for a collateral consideration.

Then it has been said that in other countries of the Commonwealth, different rules prevail, and why in this country should the rule of the seniormost judge stepping into the office of Chief Justice be adopted? But every country proceeds according to its traditions and conventions. If in the year 1950 or shortly thereafter the convention had been set up that not the seniormost puisne judge shall be appointed the Chief Justice, but someone else who in the view of the Government is better fitted to hold the office, then the view taken and expressed by the Government in the present case may not have been very suspect. But the convention in our country has been that the seniormost puisne, judge steps into the office of Chief Justice, irrespective of any other consideration. The only exception was in the unfortunate case of Justice Imam, a very fine judge, a very fine gentleman, who would have made an ideal Chief Justice but for the fact that he was incapacitated and could not function as a judge, much less as a Chief Justice.

It has been further said that a judge should have a fairly long duration in office and on that ground appointment of a Chief Justice for a short duration is not in the interest of any one. I, ladies and gentlemen, have the distinction, the unique distinction, of having till now the shortest duration in office as Chief Justice, just barely 35 days. That was not then regarded as a ground for passing me over. There have been other instances. Mr. Justice Sarkar sat in office for less than 3 months. That was then not regarded as a disqualification. Besides, Mr. Justice Grover, if appointed, would have outlived Mr. Justice Ray in office before Mr. Justice Ray, in normal course, could have expected to be appointed Chief Justice.

Then it is said that the judge must have, apart from the quality of leadership, administrative experience. Two of the judges passed over have been Chief Justice of High Courts and have had considerable experience of administrative work. But that was possibly forgotten.

It is next said, by way of apologia, "Do not suspect our motives. We have attempted to do the best by the Supreme Court and there is no reason why this controversy should be raked up." If there was the slightest reason for thinking that this was done honestly and bona fide, I for one would say, "Right or wrong, it has been done and there is no reason why the controversy should be perpetuated." But the decision, in which three of the Judges had participated and delivered judgements which did not appeal to the powers-that-be, was followed within a day of its deliver by an order of their supersession. If there is any way of judging the motives of people, this is one-the sequence of events.

But one came the frankest of the Ministers who have made apologies on behalf of the Government. Apart from the reference to the "forward-looking judge," the Minister also said something which I had to read twice to see if I had read it correctly. It is reported in the newspapers that the Government wanted to avoid confrontation with the Supreme Court! Just try and think, ladies and gentlemen, as to what is underlying this. If any decision is given against the Government, it amounts to confrontation between the Supreme Court and the Government! Therefore those judges must be appointed who are likely or expected not to deliver judgements against the Government. If that be the true motive-and that has been frankly stated-we must take off our hats, if we wear any, to the gentleman who has perpetrated this doctrine. It is not a doctrine which permeates any democratic form of Government. It is a doctrine of a communistic form of Government where the judiciary is regarded as a part of the executive and the judges must take their orders from the Government. And if they do not, they are under serious pain of being dismissed from service or of being shown the Order of the Boot or their proper places. If this is intended by the gentleman who said that the Government wanted to avoid confrontation between the Supreme court and the Government, it is a sad day for our country that we are straying from the path of democracy which has been set up in our country and which is attempted to be nurtured.

A judge of the superior Court, either the High Court or the Supreme Court, when he enters upon office, takes an oath to decide cases according to law, according to the Constitution, without fear or favour, without affection or illwill. I believe the next amendment which may be made in the Constitution should add "save where the Government is concerned." This is not something which I state as a matter of joke, but if the trend persists, then that day may not be far when the judiciary may not be regarded as an independent organ of the State which is intended to keep the enthusiastic hotheads from running away with their ideas in the supposed interests of the State and to make them realize that there is something higher, something better, something more important in the interests of the State which has to be considered, viz. the law of the land and the Constitution of the country.

Ladies and gentlemen, my mind goes back to the year 1947 and the days that shortly followed. I, for one, thought that the millennium for our country was not far, and many shared this opinion. We had everything which would make our country one of the foremost in the comity of nations: we had an incident culture, we had a strong feeling of moral values, we had

amongst our people technological and technical skills of no mean order, we had resources, and we had friends also. When Pandit Jawaharlal Nehru said at the midnight following the 14th of August 1947 that the country had ‘a tryst with destiny’, it thrilled many, but during these last 25 years we have gone step by step lower and lower. The last manifestation which we have seen is not an isolated phenomenon. It is something which is a part of the pattern of things: instead of proceeding further and improving our condition economically and politically, we are going from bad to worse. And it is a part of this pattern that an attempt is made upon the citadel of justice, that judges will be appointed or preferred only when they are willing to toe the line of the executive, and if they do not do so they will be shown the boot.

Ladies and gentlemen, you represent the intelligentsia and your function is not merely to come here and hear the speeches for a few hours, but to take an active part and propagate amongst our people that the destiny for which this country is marked out and was marked out is not the one towards which we appear to be progressing, but rather a higher destiny with which the people of this country have a tryst. And if we are to achieve in the comity of the world a real democracy, any attempt at denigration of the judges, whether they are of the highest Court or of the lower Courts, must be resisted.

5. Back from Freedom to Tyranny

C. K. Daphtary, M.P.

(FORMER ATTORNEY-GENERAL OF INDIA)

The news that came on the 25th was a shock not only to lawyers but to the public as a whole. Mr. Shah, who made the opening remarks, adverted to the presence of, what he was good enough to call, “eminent lawyers”. But this is a matter which does not concern lawyers only. It is a matter which strikes at the root of honest growth, at free speech, at freedom of thought and, in fact, at all that is included in the word “liberty”. You all, as Mr. Shah has pointed out, have an interest in the matter. It is not that you should simply see the bad news, fold up your newspaper and cease to think about it. You will remember, at the time when there was a great deal in the papers about smoking and cancer, a man was asked, “Have you seen in the papers that smoking produces cancer? What are you going to do about it?” The answer was, “I will stop reading the newspapers”. I hope and I believe that that will not be the attitude of the public to something so serious as this.

The first thing that happened, when the news was published, occurred on the very next day, to my knowledge, in a Court. An application was made to a judge for some injunction against the Government. And the judge said, of course in jest, “Oh, can I do that now?” Tomorrow, he will ask himself, “Should I do it?” What is the jest of today will be the truth of tomorrow.

It is good that Mr. Kumaramangalam has come forward and, with characteristic honesty, made a clean breast of what was behind the crime. The first thing that was done, as you all know, was to put the foot-soldier forward to meet the fire. The Minister of Law, who was till recently the Minister of Law and Justice and whose Ministry has now been halved, relied upon the convention, upon past examples, all wrongly applied, upon the Law Commission’s report wrongly interpreted and wrongly explained. But it was only when the General came galloping

forward on his red horse that we knew what we had all suspected before was the real reason. He is an able man, a man of undoubted talents; it is a pity that they should be lent to an unworthy cause. But he is not to blame. There is a group of persons, a political group, which has believed throughout, and has not ceased to express that opinion, that the Constitution must be destroyed and, if possible, it must be destroyed from the inside. I am right, I think, in saying that the Minister responsible for this is a subscriber to that particular belief; and though he may have changed his label, his beliefs presumably remain the same. As the Bible says, "Can the leopard change his spots or the Ethiopian his skin?"

Now the pattern is pretty plain. We have got it in the coal mines, we have got it in the coking coal and the non-coking coal mines. It is a step-by-step method. The first thing is to take cover the management of the concern. The second step is to take over the whole undertaking. And I have not the least doubt that the ultimate result is going to substantially a taking over of justice by the executive. You all know that the statutes which provide for taking over an industry always have a section in it, which is that the undertaking shall vest in the Government "free of all encumbrances". This undertaking will no doubt presently vest in the Government "free from the encumbrance" of being just!

Just consider, ladies and gentlemen, what all this is going to mean. As I told you, this one judge made a jest, which reflects the truth of tomorrow. And what is that truth going to be? Everyone who wants to get on, to get on to the next step in the ladder, will have to conform. a line will be drawn for him and he must toe the line. I have no doubt that presently a handbook will be issued – "Morals and Manners for Judges". It will tell them as far as possible what is the concept, the Government's concept, of social justice, of the welfare state, of the methods to be adopted. But he is going to find himself in a fix, because there is no hard-and-fast line; it is not a line that can be chalked straight. Much will be left for him to worry about for himself as to whether what he is going to do will advance social justice or will retard it. And he will take the safe line, the safe line which he believes must be to decide in favour of the Government or the governmental institution, unless of course, and it is not an impossibility, he has been told ahead what to do.

Now, all sorts of things have been said. A convention has been broken. Well, it has been said that to press forward one principle and, in so doing, break every principle that stands against it is not consonant either with private morality or public justice. It was a healthy convention. I don't want to repeat what has been already said about it. But consider the position – that the judges of the Supreme Court are a hand-picked lot, if I may use that expression. They have been picked out from the different High Courts (and one Judge straight from the Bar) because of their merits. They are equal in their judicial qualities. Therefore, it would be invidious to pick out any one of them and put him at the top. It would mean bringing favouritism, nepotism and various other "isms" into the choice. It was therefore that a convention was established, a healthy one. That has been broken, not for the reason or the reasons which the Law Commission had in mind, but for a totally different one. the Law Commission never said, nor did it think, nor did it dream, that the convention should be broken on no principle, but merely on the basis of political expediency.

The reply that was given in the Lok Sabha contained various “counts”, if I may so call them. Each of them has been spoken of by the preceding speakers. But apart from what has been said, I call your attention to the mentality at the back of it. Democracy, it was said the other day, does not mean the status quo. Of course, it does not mean the status quo. Democracy must always mean progress also. We left behind one regime in 1950, which has been labeled “despotic”, “tyrannous”, various other words have been used. And we moved on from there to the goal of absolute freedom. A controlled freedom, no doubt, - controlled in the interests of society as a whole. The fundamental rights have their limitations, carefully thought out and enumerated. And we have moved, in the matter of every day life, from laissez-faire to regulation, from regulation to control. And are we now going to move from control to enslavement? The pendulum no doubt swings. We have moved from tyranny to freedom. Are we now going back from freedom to where we came from?

Ladies and gentlemen, the implications of what has been done are patent to all of you. They concern you all. They will presently affect you all much more than this one move. Three judicial lives have been sacrificed, sacrificed on the altar of what God? Not to Mammon. To Baal, the false God. We have been told that we must reconcile ourselves to change. Yes. What change? They speak of the “winds of change”. From what direction does the wind blow? The wind that blows from the Steppes is a chilly wind.

6. Subversion of the Constitution from within

H.V.R. Iengar

(SECRETARY TO THE CONSTITUENT ASSEMBLY AND FORMER GOVERNOR OF THE RESERVE BANK OF INDIA)

I think most of you would be wondering what I, of all people, who was formerly a humdrum civil servant, have got to do sitting on this platform amidst this whole galaxy of legal talent in our country. If a Gallup poll were taken amongst the lawyers of India as to who are the topmost members of the Bar, I am sure they would include every single person sitting on my right.

Although I am completely ignorant of constitutional law, it did happen in the course of my official career that I was the Secretary of the Constituent Assembly of India from the day it started viz. the 9th of December 1946, till the day it was wound up. And as Secretary of the Constituent Assembly, it was my privilege to be the Secretary of every single Committee of that Assembly-the Fundamental Rights Committee, of which Acharya Kripalani was the Chairman, the Minorities Committee of which Sardar Patel was the Chairman, the States Negotiation Committee of which Pandit Jawaharlal Nehru was the Chairman, and the rest. I was, of course, only the administrative head. There was a Constitutional Advisor to give constitutional advice to the members of the Assembly. He was a very distinguished man; shy, modest, retiring and completely dedicated to his job and more far-sighted, as you will learn subsequently, than many people thought at the time-the late Sir B. N. Rau. But although it was none of my responsibility to take part in constitutional discussions, it necessarily happened because in the nature of my job

I was thrown into contact with the great leaders at the time, and was aware of the currents, winds and cross-currents that blew across the corridors of the Constituent Assembly.

And who were these leaders? They were not only Congress people. Mahatma Gandhi had advised the Congress that in the interests of framing a sound Constitution they should not pack the Assembly with their own nominees, with their own party members, but should go outside and seek talent from wherever it came. In those days, the Congress was at the height of its glory. Out of 210 seats, they actually got 199, almost 200. But they selected 30 outstanding people who did not belong to the Congress Party. And what a galaxy they were! There were, for instance, the great lawyer Alladi Krishnaswamy Iyer, the great civil servant Sir N. Gopalaswamy Iyengar, the great philosopher Dr. Radhakrishnan who subsequently became the President of India, Pandit Kunzru who was the President of the Servants of India Society, a professor of education, a professor of English from Calcutta called Dr. H.C. Mookerjee, an Indian Christian who subsequently became Governor of West Bengal and various other people of this sort. There was Dr. Ambedkar and they not only made Dr. Ambedkar a Member of the Drafting Committee, but the Drafting Committee elected him as its Chairman. And he was no lover of the Congress! I met all these gentlemen in the course of my work and I came into contact with the discussions that used to take place.

Now, in retrospect, I think three fundamental decisions were taken by the Constituent Assembly. The first was that there should be universal adult franchise in India. There were some people, Pandit Kunzru for instance, who doubted the wisdom of this. And it may be retrospect that several of us might doubt whether this was altogether wise to do,---to jump from a completely restricted franchise to an unlimited universal franchise. And there are people who genuinely think that many of our troubles today are due to the fact that the politicians have got to pander to the ignorance of our electorate.

The second major decision taken was that we should go in for a parliamentary system of government. In other words, we should have a President who is like the Crown in England, or to put it in crude language, who is just a signing dummy, and a Ministry headed by a Prime Minister who is only responsible to Parliament. Now when they took this decision, there were many people in the Constituent Assembly who doubted the wisdom of this. They thought that this would invest the Prime Minister in the country with too much power. Therefore Sir B. N. Rau in his wisdom suggested that there should be a provision in the Constitution investing the President with certain special powers to be acted upon in consultation with what he called the "Council of State". Sir B. N. Rau envisaged, what was actually happened, that there could be a political vacuum in the States, and the provision for this situation, of course, is the induction of President's Rule. But he asked himself what would happen if there is a political vacuum at the Centre. This could happen. After all the Constitution is not made for five years or ten years or even twenty-five years. It has to be made for a hundred or two hundred years. He, therefore, asked himself: supposing a situation arises where there is a political vacuum at the Centre, what happens then? He suggested that in certain situations the President ought to be vested by the Constitution in express terms with certain powers to be used by him in consultation with what he called the "Council of State". And who were to be the members of this "Council of State"? It included the Prime Minister of the day, the Deputy Prime Minister, if there was a Deputy Prime Minister, the Chief Justice of the Supreme Court, the Chief Justices of the various High Courts

and a few other people selected ad hoc because of their eminence in public life. Unfortunately—I say “unfortunately” deliberately—this provision was negated and it was decided that there should be a parliamentary system of government exactly as in the U.K. But then, certain members pointed out that this was a very dangerous method. The discussion arose about the position of the Prime Minister in the context of the fundamental rights and, curiously enough, in the matter of the appointments of judges of High courts and the Supreme Court. There was a member who pointed out that the Prime Minister would be all powerful; and if there was a party in power which decided, for instance, that the fundamental rights should be abrogated or abridged that decision would have effect.

There was a point to this, because as we have now known from experience, it is not the majority of the people who have put the Congress into power. I have been looking at the figures. Not in one single election since 1951 has the Congress won an outright majority of the votes cast. In 1952, in spite of the tremendous popularity of Pandit Nehru, the Congress polled only 45% of the votes. In 1957, it was 47.7%, in 1962 it slumped to 44.72%, in 1967 it was 40.73% and in 1971, in spite of the so-called “Indira-wave”, it was only 43.62%. Well, the point was raised that if there is a political party which is in office in Delhi, based on a minority of votes—and mark you, because of our particular electoral system, with this minority of votes they have a tremendous majority of seats—and if it decides that there should be an abridgement of fundamental rights or that a completely unsuitable person should be appointed a High Court judge or a Supreme Court judge, what happens? Therefore, the framers of the Constitution decided, and quite rightly decided, that there should be some curb on the executive, that there should be some restraint on the exercise of its power and authority, and they therefore came to the conclusion that we should not follow, undiluted, the U.K. system but should tag on to our Constitution a part of the American system of the sharing of powers. In other words, they said that there should be a judicial review of laws and regulations in our country. It was therefore laid down expressly in the Constitution that power in this country shall be exercised by three groups, the executive, the legislature and the judiciary. This was the third major decision made by the Constituent Assembly.

Now, it was believed at the time that the judiciary would be completely independent, that it would give an honest opinion as to whether a particular law was constitutional or otherwise, or as to whether a particular action or series of actions taken by the Government was in accordance with the Constitution. But what has happened now? I don’t want to repeat all that has been said by the previous speakers—this third leg of the table has been made to collapse. And therefore if we do not look out, what is going to happen is that the executive of the country can just run away with the bit between its teeth!

One tremendous illusion of the powers in Delhi is this—I discovered it when I was working as Secretary to the Government of India: they believe that they are going to be permanent. I recall a Minister who introduced a very drastic amendment of the law seeking very serious powers for the executive. I told him, “Sir, I think this is too drastic”. He said “I am honest. Don’t you know that I am honest? I am not going to misuse this. I am going to use this in the interests of the country”. I said “I accept this. But how do you know that 5 or 10 years from now, your successor will not be a person who will misuse this power that you have given to him?” This is precisely what has happened. I do not want to mention names.

Now I have not the slightest doubt in my mind that Indira Gandhi is completely sincere in all that she says and does. But she suffers from the illusion that if she takes power, that power is going to be used permanently for the good of this country. The poor lady does not seem to realize that there is no such thing as a permanent Prime Minister! She is not going to live for ever and one day she is going to be succeeded by a Prime Minister who may not have the same attachment to the country as she has.

My friend Mr. Daphtary said there are forces which have infiltrated into the Congress. I take a very serious view of these forces. They believe in subverting the Constitution from within. Now, God forbid, if these forces should seize power (and they could even on a minority of votes), they could use these very powers that are given under the various constitutional amendments; and by the exercise of the prerogative which Government has now exercised of appointing persons, committed persons, to the Judiciary, what would then happen would be a complete subversion of law and order and evolutionary progress which we all hope for.

I am profoundly pessimistic about the future of this country. Mr. Motilal Setalvad is, he told me, 88 years young. Well, I plead guilty to being 71 years young! I don't know about my friend Chandu Daphtary-he looks younger than me but I don't know if he is older! These two gentlemen here, I know, have retired recently as Chief Justices, so they must be only 66 or 67. We belong to the generation that is passing away. But we have children and we have grandchildren and we want them to have good life. And that good life is not possible unless the Government behaves with a certain degree of responsibility.

I remember talking to Sardar Patel once about the exercise of power. He told me a very wise thing. He said, "The exercise of power must be done with a great deal of restraint. You don't use power in order to hit people on the head. You just show that power exists in your hand and if you do it gently enough, you will produce results."

I am a little surprised that a story which I have heard has not been mentioned by any of the previous speakers. I cannot vouch for its accuracy, but I believe it is true.

When Patanjali Sastri retired as the Chief Justice of India, Justice Mehr Chand Mahajan was the seniormost Judge. At that time it was suggested to Pandit Nehru that he should not go by the rule of mere seniority, because Justice Mahajan would have less than one full year to serve as the Chief Justice. The next seniormost Judge was Justice B. K. Mukherjea and the Government proposed to make him Chief Justice by passing over Justice Mahajan. But Justice Mukherjea made it clear that not only he but most of the other Judges would resign if Justice Mahajan was superseded; and promptly the idea of passing over Justice Mahajan was dropped. This shows, if anything does, that we have fallen pretty low from the standards of those days.

7. The Supersession of Judges- The Price of Executive Interference

K. Subha Rao

(FORMER CHIEF JUSTICE OF INDIA)

(Published in The Statesman in the Issue of May 14, 1973)

The supersession of the three senior judges, in the matter of the appointment of the Chief Justice of the Supreme Court, on the day after the Supreme Court delivered its judgement in the Fundamental Rights case ignited a controversy throughout the country; almost all leading advocates and most of the bar Associations questioned its propriety. There is a conflict among the political parties. The Congress and the CPI supported the action and all the other parties opposed it. In Parliament the discussion proceeded on party lines. As the action affects the independence of the judiciary, it is necessary that the intelligentsia should carry out a national dialogue throughout the country.

Four reasons are given by the executive in justification of its action. First, under the Constitution the President has an absolute discretion to appoint any qualified person as the Chief Justice of India. Secondly, the executive followed the recommendations of the Law Commission made in 1965. Thirdly, in appointing the Chief Justice and in superseding the senior judges, the executive has also taken into consideration the philosophy of the judges. Finally, the superseded judges represent vested interests.

The second reason given is that the executive followed the recommendations made by the Law Commission in the matter of appointment of the Chief Justice of India. The Commission's Report was made on December 31, 1956. The supersession of the three judges was made by the executive on April 25, 1973, that is the day after the judges delivered the judgement against the contentions of the executive. The Commission's Report, which was put into cold storage for about 17 years, was taken out to support the executive action. The said Report was impliedly rejected by long inaction but was now suddenly revived to sustain an indefensible action.

That apart, what are the recommendations made by the Commission? It said among other things: "The Chief Justice of India has important duties to perform. He should not only be a judge of ability and experience but also a competent administrator capable of handling complex matters that may arise from time to time, a shrewd judge of men and personalities and, above all, a person of sturdy independence and towering personality who would, on the occasion arising, be a watch-dog of the independence of the judiciary." These are the qualifications of an ideal Chief Justice of India.

"It is necessary to set up a healthy convention that appointment to the office of the Chief Justice rests on special considerations and does not as a matter of course go to the seniormost puisne judge. It may be that if the seniormost judge fulfils these requirements, there could be no objection for his being appointed to fill the office." This recommendation does not possibly support the executive action to pass over three most senior judges, who on all accounts were hailed to be very able men.

"If such a convention were established it would be no reflection on the seniormost puisne judge if he be not appointed to the office of the Chief Justice." This recommends establishment of a new convention. It does not support a sudden deviation through arbitrary action.

Two members of the Commission along with others issued a statement which explains the recommendations of the Commission and gives their views on the supersession. It said in effect: The three senior judges had been passed over because their rulings displeased the Government. There cannot be two opinions regarding the caliber and total suitability of the three judges and two of them had served with distinction as Chief Justice of High Courts. The Commission's recommendation had been taken out of context without establishing a convention. If the Government merely wanted to carry out the recommendation, it could have declared the new convention in advance and taken the Bar and the public into confidence but instead the letter and the spirit of the Commission's Report were flouted and the judges were passed over merely because their decision went against the Government.

On the question whether the Commission's recommendation is sound or the convention that was followed till recently is sound there may be difference of view. But to rely on it after ignoring it for 17 years to support the executive action does not carry conviction to any reasonable mind. If the Government was seriously interested in changing the convention, it should have published for disinterested machinery to implement the new convention. Whatever the Commission said, it did not say that the President on the advice of the Prime Minister or in exercise of his arbitrary discretion could supersede eminent seniors if they decide a case against the Government.

The next defence for the executive action is that it is entitled to take into consideration the social philosophy of a person for appointment as judge or Chief Justice. Who judges the quality of his social philosophy? Of course, the executive! It means in simple terms that the judiciary should be committed to the views of the men in power. Constitutional democracy and committed judiciary are a contradiction in terms. Constitutional democracy implies limitation of power. An independent judiciary keeps the exercise of power within bounds. If the judiciary is committed to the predilections of power, the limitation on power is automatically removed. The doctrine of committed judiciary is a concept of totalitarian ideology and is out of place in a democratic polity. In a totalitarian country there is one ideology and that is that of the irremovable party in power; in a democratic country, parties with different ideologies occupy the seats of power at different times and in a federal set-up, at the same time, in different States. In the former the judiciary is the handmaid of the party in power and one of the instruments to implement its policy; in the latter the judiciary is entrusted with the duty to keep the party in power within the constitutional bounds; parties with different ideologies may come to power but the Court judges their actions only in terms of the Constitution. Briefly stated, the judicial commitment is to the Constitution and not to the fluctuating ideologies of different parties that function under the Constitution.

The last defence is the cheap slogan, namely, that the present judiciary "supports vested interests". This is a blatant attempt to deflate the credibility of the judiciary in the eyes of the poorer sections of the community. Why should they support the vested interests? They come from all classes of society, middle class, lower middle class and poor. Some of them belong to backward communities. So too the members of the executive and Parliament. Perhaps if a comparative study is made, some people in the executive and in Parliament are in a way richer than most of the judges of various Courts. Surely the members of the executive and Parliament do not belong to the lowest strata of society. It must therefore be assumed that all responsible

people, whichever institution they represent, discharge their duties in terms of the Constitution and for the good of the entire people of the country. The attack on the judiciary does not stem from the silent majority which, by and large, has a considerable respect for it, but from a minority of intelligentsia which attacks it as part of an alleged design to destroy the Constitution.

An objective scrutiny of the work of the judiciary during the last 25 years after independence will disclose its effective contribution to the social progress of the country. Briefly stated, it has propounded the high concept of the rule of law in which socio-economic justice is inextricably integrated; it has given practical content to the doctrine of equality; it has worked out the doctrine of social justice in an equitable manner, so as to alleviate the condition of the under-privileged section of society; it has maintained the heavy tax structure of our country in spite of its many defects; it has validated most of the land laws and even held, on the doctrine of prospective overruling, that the earlier amendments which were void would continue to be good for the future agrarian reforms; it has held that the State has power to nationalize industries or institutions and that compensation is not justiciable provided the law lays down the relevant principle of legislation and the compensation given is not illusory; it has protected personal liberty against arbitrary encroachment by the State; it has evolved industrial law maintaining a balance between labour's just claims and the demands of discipline; it has reduced the arbitrariness in administrative law and made it an effective instrument of progress; it has given liberal construction to many ancient concepts of personal law and brought them in line with the trends of the modern society; it has validated most of the legislation conceived to put down social evils such as prostitution, alcoholic drinks, smuggling, gambling, etc.; it has approved all laws regulating external and internal trade, etc.

The judiciary, therefore, gave real support to the legislature in its attempt to bring about a new social order where there will be justice, political, social and economic, in terms of the Directive Principles of the Constitution. But it prevented unconstitutional action by the legislature and the arbitrary action of the executive and directed them through the channels of democracy and the rule of law. For, under the Indian Constitution, means is as important as the end. Indeed, both are inseparable parts of the social change. This judicial check, the men in power do not like.

The invocation of the American example to support the executive action is inappropriate. In the USA both the effective parties believe in constitutional philosophy, in India there are some parties and individuals who do not believe in constitutional philosophy; in the USA the term of the office of the Chief Executive will not exceed eight years, in India the Prime Minister's office has no such limitation; in the USA the nomination of a judge by the President is subject to the approval of the State which is composed of the members of all the parties; in the USA the President consults important bar Associations, in India they are ignored; in the USA the senior judges are not superseded and a puisne judge appointed as a Chief Justice, but an eminent outsider is made a Chief Justice, in India three eminent senior judges were superseded immediately after a judgement went against the executive; in the USA the electorate is educated and the people articulate their aspirations, in India the executive claims to articulate the mute aspirations of the illiterate public. There is no comparison between the conditions in the two countries. We must evolve our own conventions suitable to the conditions in our country.

Over the years the Supreme Court of India has built up a high reputation in India and in all democratic countries. By one precipitate action of the executive its reputation has been brought down. It has created a fear complex among the judges. The Court has become suspect in the eyes of the Bar and the public. Its exemplary judgements will invite unfair criticisms. The new Chief Justice and his colleagues may find it difficult to work under such conditions. But I hope and trust that they will do their best to recapture the public confidence the Court has lost and make it a citadel of justice.

It is now necessary to evolve a foolproof procedure to exclude arbitrary executive interference in the matter of the appointment of judges and Chief Justices of the High Courts and of the Supreme Court. The present indignation shall not be allowed to die down but shall be diverted through constructive and continuous dialogue to evolve a system of selection to the highest judicial offices.

8. “The Saddest Day in the History of Our Free Institutions”

(JOINT STATEMENT ISSUED ON APRIL 26, 1973)

M.C. Setalvad
(former Attorney-General of India)

M.C. Chagla
(former Chief Justice of Bombay and former Cabinet Minister)

J.C. Shah
(former Chief Justice of India)

K.T. Desai
(former Chief Justice of the Gujarat High Court)

V.M. Tarkunde
(former Judge of the Bombay High Court)
and
N. A. Palkhivala

“The Government of India’s decision to supersede three seniormost and highly respected Judges of the Supreme Court is not only unprecedented in the nearly quarter century of the Court’s existence, but is a manifest attempt to undermine the Court’s independence.

“It cannot be denied that the three Judges were passed over only because their rulings displeased the Government. There can be no two opinions regarding the caliber and total suitability of each of the three superseded Judges; two of them have already served with distinction as Chief Justices of High Courts.

“Thus for the first time in the Court’s history, a Supreme Court Judge’s rulings against the State are regarded as disqualifying him from the high office of Chief Justice of India. This cannot but affect judicial independence right from the Supreme Court to the High Courts and the lower judiciary.

“It is misleading and unkind to recall the case of the supersession of Justice Imam, for, he unfortunately became incapacitated and simple could not function as a Judge.

“It is disingenuous of the Government to invoke the Law Commission’s 14th Report, whose recommendations the Government has hitherto ignored. If it relies on the Report now, fifteen years later, it is only to cover its improper action.s

“Far from supporting the Government’s case, the Law Commission’s Report destroys it. It says emphatically that the convention of appointing the Chief Justice of India regardless of seniority should first be laid down before any such appointment is made. Only “if such a convention were established, it would be no reflection on the seniormost puisne. Judge if he be not appointed to the office of the Chief Justice.’ Further, the recommendation of the Law Commission was restricted to cases where on consideration of calibre, merit and suitability the senior Judges deserved to be superseded, which is beyond question not the case here. If the Government wanted honestly to carry out this recommendation, it could have declared the new convention well in advance, and taken the Bar and the public into its confidence. Instead, the spirit and the letter of the Commission’s Report have been flouted and Judges have been passed over merely because their decisions went against the Government. This improper action will inflict great and lasting damage on the judiciary. It is the saddest day in the history of our free institutions.”

9. The Bar Protest

A.G. Noorani

In the evening of April 25, 1973, the country received the news of the Governments decision to supersede three Supreme Court Judges for the office of the Chief Justice of India, with shock and disbelief. The reaction was swift, spontaneous and almost unanimous. Probably no decision of the Government in recent years has evoked such deep resentment or aroused so strong a protest. It is also no exaggeration to say that never has the Bar spoken so strongly or unitedly on any issue since independence as on this occasion. This itself is proof of the utter perversity of the Government’s action.

The Bar's protests need to be chronicled not only as a record of its finest hour but also as an example of the heights which it can attain in a moment of crisis.

Most appropriately, the first public expression of resentment by a member of the Bar came from no less a person than the Chairman of the Bar Council of India, Mr. Ram Jethmalani. In a statement issued within a few hours of the announcement of the Government's decision he characterized it as "the most shocking display of executive arrogance". Mr. Jethmalani concluded his statement by saying that "the Bar will have to consider seriously what steps to take to preserve the authority of the Courts".

Six of the country's most eminent jurists, Mr. M.C. Setalvad, Mr. M.C. Chagla, Mr. J. C. Shah, Mr. K.T. Desai, Mr. V.M. Tarkunde and Mr. N.A. Palkhivala, issued a statement the very next day, condemning the Government's move as "a manifest attempt to undermine the Court's independence".

The Supreme Court Bar Association passed a resolution on April 26, in which it recorded its conviction that "the action is a purely political one and has no relation whatsoever to merits, more so when one considers the timing and the manner of the appointment". The resolution appealed to "public opinion and to all Bar Associations and bar Councils to raise strong protests against the attempt on the part of the Government to make the judiciary subservient to the executive and subject to political pressures and dependent on the Government's patronage and influence". As it happened, that very day members of the Bar elsewhere in the country were also registering their protests.

The Government of India's unprecedented step brought forth an equally unprecedented and spontaneous protest from the members of the Bombay Bar who for the first time in the 110 years' history of the High Court resolved not to participate in any Court on April 26. No hearings took place in Bombay before any of the High Court Judges, in the City Civil and Sessions Courts and the Small Causes Court. The Income-tax Appellate Tribunal was also closed as Advocates refrained from participating in any proceedings.

The general body of the Advocates' Association of Western India met under the chairmanship of its President Mr. R.W. Adik and passed a resolution condemning the move. Addressing the general body, Mr. N.A. Palkhivala, one of the signatories to the Law Commission's 14th Report, behind which the Government sought to take shelter, explained the implications of its recommendations and pointed out how far removed from the Report was the Government's move. "Clearly, as a matter of principle, we think it our duty to express publicly our protest at this unprecedented step which will undermine judicial independence and the dignity not only of the Supreme Court but also of the High Courts and other courts in India where now the same pernicious practice may be followed by the State Government's" he said.

Members of the Original Side of the High Court also passed a resolution, strongly disapproving of the Government's action. A similar resolution was adopted by the members of the Bar practicing in the Bombay City Civil and Sessions Courts.

The Bar Council of Maharashtra in a resolution passed at its executive meeting also condemned the Government's action.

In Chandigarh nearly a hundred Advocates of the Punjab and Haryana High Court noted with "grave concern the political vengeance unleashed on the Honourable Judges who strove to uphold the independence of the judiciary".

The Advocates of the Gujarat High Courts refrained from working for half a day in protest. A resolution was passed at the hurriedly convened meeting of the Gujarat High Court Advocate's Association presided over by the Advocate General of Gujarat, Mr. J.M. Thakore, who was the ex-officio President of the Association, recording its strong protest.

Later in the day (April 26) the Supreme Court Bar Association again met in an emergency meeting and adopted a resolution by an overwhelming majority, condemning the Government's move.

Doubtless, there were voices of dissent and it is no aspersion on the integrity of the lawyers who supported the Government's action, to point out that they, unlike the overwhelming majority of the Bar, were trammled by party discipline or political affiliation. In the Supreme Court Bar Association Mr. R.K. Garg, a prominent member of the Communist Party of India, and in Bombay Mr. Rajni Patel, an eminent lawyer and President of the Bombay Pradesh Congress Committee, headed a list of signatories, most of whom were Congressmen, supporting the Government action.

At time passed, the wave of resentment, far from subsiding, swelled. The Bar Association of the Calcutta High Court met on April 27 and adopted a resolution by an overwhelming majority, condemning the Government's decision as "a blatant and outrageous abuse of power to undermine the independence of the Judiciary and lower its prestige at all levels to the detriment of the liberty of the people of India.

The Delhi High Court Bar Association, the Advocates' Association of Bangalore, the Visakhapatnam Bar Association, the Madhya Pradesh High Court Bar Association, all expressed their strong disapproval

Advocates in Madras City held a protest demonstration before the High Court, carrying placards inscribed with slogans such as "Behold countrymen, dark days ahead" and "Independence of the highest Court of the land is at stake".

On April 28 an extraordinary general body meeting of the Madras High Court Advocates' Association was held to consider the crisis. A resolution adopted by an overwhelming majority said, "We think it our duty to express publicly our protest at this unprecedented step which shall undermine judicial independence and dignity, not only of the Supreme Court but of the High Courts and other Courts in the country".

The Srinagar Bar Association passed a resolution condemning the Centre's action. The meeting was presided over by no less a person than Mr. Gulam Mohiuddin Karra, a veteran in

the labour movement and in the political field, besides being a distinguished lawyer. The Association's resolution termed the Government decision as "politically motivated" and one which would "undermine and lower the prestige of the judiciary". Members of the Jammu Bar Association did not attend Courts on April 28 in protest against the supersession. Lawyers in Jullunder also stayed away from Courts. Bar Associations at Hyderabad, Rajahmundry and other places in Andhra Pradesh registered their protest. So did the Indian Federation of Women Lawyers. The Managing Committee of the Bombay Incorporated Law Society likewise expressed its strong protest.

The Bihar State Bar Council passed a resolution on April 29, which characterized the Government action as one designed to undermine the independence of the judiciary.

On April 30 the Supreme Court Bar Association decided to observe "Bar Solidarity Day" on May 3 throughout the country. It directed members of the Bar not to attend Courts on that day and to take steps to arouse public opinion in favour of the independence of the judiciary.

In Madras the boycott of the Court by nearly 3,000 lawyers in the city on April 30 was complete. The entire High Court looked deserted. The City Civil Court, the Court of Small Causes, the Presidency Magistrate's Court, were all deserted.

On April 30 the Allahabad High Court Bar Association joined in the protest. As everywhere else in the country, a resolution condemning the move was passed by an overwhelming majority—132 votes in favour and seven against. It was a very strong resolution which the Allahabad High Court Bar Association adopted. It described the Government action as "murder of an impartial judicial system and democracy".

On May 1 the Advocates of the Allahabad High Court observed a day's token strike in protest. The boycott in the Allahabad High Court by 1400 Advocates was a signal success. An emergency meeting of the High Court Bar Association congratulated the members for observing the Bar Solidarity Day. It was further resolved that the portraits of the three Judges who had been superseded, viz. Mr. Justice Shelat, Mr. Justice Hegde and Mr. Justice Grover, should be installed in the Library Hall of the Bar Association as insignia of judicial independence.

The members of the Madhya Pradesh High Court Bar Association decided not to attend Courts on May 4 and to observe the Bar Solidarity Day in response to the Supreme Court Bar Association's appeal.

In Gauhati a general body meeting of the Lawyers' Association met on May 1 and adopted a resolution, expressing "grave concern" at the Government's action.

The Executive Committee of the Bar Association of India met on May 2 and adopted a resolution condemning the supersession of the Judges.

The Supreme Court Bar Association's appeal found a ready response everywhere. The Calcutta High Court Bar Association met on May 2 and called upon its members not to attend Courts the next day in response to the call to observe the Bar Solidarity Day. So did the

Chandigarh District Bar Association, the New Delhi Bar Association, the Income-tax Bar Association and indeed many such institutions.

May 3 will ever remain a red letter day in the history of the legal profession in India. Lawyers throughout the country boycotted the Courts on that day. In Delhi work at the Supreme Courts and the Delhi High Court came to a complete standstill. Lawyers in the Punjab and Haryana, Jammu and Kashmir, Rajasthan, Gujarat, Madhya Pradesh, Himachal Pradesh and Bihar, stayed away from Courts. Lower Courts in these States were also affected. In some parts of the country, however, such as Maharashtra the High Courts had already adjourned for the Summer Recess. In the Supreme Court, where the Cause Lists of the day's business used to be hung huge panels and placards read: "Boycott Courts, "Protest against subversion of independence of Judiciary", and "Save Judiciary and Democracy".

The situation in Calcutta was typical of that which obtained in the rest of the country. Lawyers boycotted the High Court and Civil Courts. Members of the Calcutta High Court Bar Association, Calcutta Bar Library Club, the City Court Bar Association and the Small Causes Court Bar Association did not attend their respective Courts that day. The members of the Calcutta Bar Library Club met under the chairmanship of the Advocate General Mr. Gouri Nath Mitter. A resolution to join in the boycott was adopted by an overwhelming majority—200 in favour and only 10 against. The Incorporated Law Society of Calcutta also associated itself with the protest.

No work was done that day in the Jammu and Kashmir High Court and in the subordinate Courts in the State. So complete was the boycott of Courts by the lawyers.

To these protests were also added the many resolutions of the Bar Associations of scores of smaller towns spread all over India, recording their keenly felt dismay at the Government's high-handed action which they strongly condemned.

As a finale, the Supreme Court Bar Association decided on May 4 to issue Notices to the Union Minister for Steel and Mines Mr. S. Mohan Kumaramangalam and the Law Minister Mr. H.R. Gokhale, to show cause why they should not be expelled from the Association for their stand on the Judges' supersession issue.

Never before had the Bar acted in greater unison, been more deeply aroused or exerted itself for a nobler cause than on this occasion.

10. A Judiciary Made to Measure

N. A. Palkhivala

In no other democracy do the Ministers malign the Courts regularly in public as in India. In no other democracy is there such persistent talk in the ruling party about a "committed" judiciary. This background is not without significance in considering the supersession of the three Judges of the Supreme Court.

During the hearing of the great Constitutional case in which judgements were delivered just a day before Chief Justice Sikri retired, the Attorney-General appearing for the Union of India and the Counsel for the State of Kerala expressly referred in open Court, both orally and in writing, to the alternative of “political action” if the Supreme Court’s rulings did not find favour with the Government.

The passing over of the three seniormost Judges, for the office of the Chief Justice of India which fell vacant in the last week of April, raises issues which far transcend considerations of injustice merely to three individuals. It has evoked a sharp reaction from the Bar which is as unprecedented as the Government’s action itself. With the exception of lawyers who are involved in politics, there has been a near unanimous vote at the meetings of the various Bar Associations at Delhi and in various States, strongly condemning the Government’s action in bypassing Justices Shelat, Hegde and Grover.

The question is purely one of principle, and no reflection is at all involved as regards the calibre or integrity of the newly appointed Chief Justice, Mr. A. N. Ray. The only issue arising in this case is simple:

Was it on considerations of calibre, merit and suitability that the three distinguished Judges were superseded, or did they pay the price for their independence and intellectual integrity?

For the Government to rely upon the 14th Report of the Law Commission (1958) amounts to compounding the public wrong with public deception. That very Report totally destroys the Government’s case. It is noteworthy that the Chairman of the Law Commission, M.C. Setalvad, and three other signatories to the Report—M.C. Chagla, S.M. Sikri and this writer—have made public statements condemning the Government’s decision. It is not that we have second thoughts about our own recommendations. The real point is that if the Government had followed our recommendations in the Report, those three Judges would not have been superseded.

The following quotations from the Law Commission’s Report leave no doubt as to the role of courageous protector of the citizen’s rights, which the Law Commission expected the Supreme Court to play in our nascent democracy:

“It (the Supreme Court) was called upon to stand as a protector of the fundamental rights of the citizen against executive and legislative action. The importance of the Court as the upholder of the rule of law and as the bulwark of the citizen’s rights in a democratic constitution containing a bill of rights was emphasized by Chief Justice Kania at its inaugural sitting. The Court must consist of Judges who taken as a body are, as lawyers and men of vision, superior to the body of Judges manning the High Courts. Such a result can be achieved and maintained only by the exercise of courage, vision and imagination in the selection of Judges made with an eye solely to their efficiency and capacity.”

Judges Shelat, Hegde and Grover distinguished themselves as upholders of the rule of law and of the citizen’s rights; and they fully justified their appointment to the Supreme Court if one has regard “solely to their efficiency and capacity”, in the words of the Law Commission.

This raises the question whether each of these three men, though admirably fit to be a Supreme Court Judge, was not fit to be the Chief Justice. When the Law Commission recommended that, irrespective of seniority, “the most suitable person” should be chosen the Chief Judge of India, they did not mean suitability from the viewpoint of the executive. Their recommendation is in the following words:

“For the performance of the duties of Chief Justice of India, there is needed, not only a judge of ability and experience, but also a competent administrator capable of handling complex matters that may arise from time to time, a shrewd judge of men and personalities and, above all, a person of sturdy independence and towering personality who would, on the occasion arising, be a watch-dog of the independence of the judiciary....In our view, therefore, the filling of a vacancy in the office of the Chief Justice of India should be approached with paramount regards to the consideration we have mentioned above. It may be that the seniormost puisne Judge fulfils these requirements. If so, there could be no objection to his being appointed to fill the office.”

If the qualities needed, according to the Law Commission, in the Chief Justice were to be the sole criteria, there was the strongest possible case for not superseding the three Judges. The very quality which the Law Commission expected in the Chief Justice of India---fearlessness in deciding issues against the executive---has disqualified the three Judges, in the eyes of the Government, from holding that office. These three Judges yielded to none in “sturdy independence” and in their capacity to act as “the watch-dog of the independence of the judiciary”. As regards administrative competence, Justice Shelal and Hegde had already served with great distinction as the Chief Justice of the Gujarat High Court and the Delhi High Court and the Delhi High Court respectively; and there has not been the slightest allegation that Justice Grover lacked administrative competence.

Further, up till now there has been an unbroken convention of appointing the seniormost Judge of the Supreme Court as the Chief Justice. The Law Commission’s Report makes it clear that the convention of appointing the Chief Justice of India regardless of seniority should first be laid down before any such appointment is made, whereas in the present case the appointment was made without any such new convention being first established. The exact words of the Law Commission are:

“It is, therefore, necessary to set a healthy convention that appointment to the office of the Chief Justice rests on special consideration and does not as a matter of course go to the seniormost puisne Judge. If such a convention were established, it would be no reflection on the seniormost puisne Judge if he be not appointed to the office of the Chief Justice.”

In short, the Devil could make out a more plausible case for citing the Scriptures than the Government has made out for relying on the Law Commission’s Report.

The reference to the supersession of Justice Imam when Justice Gajendragadkar became the Chief Justice is both misleading and unkind, for, Justice Imam unfortunately became so incapacitated that he simply could not function as a judge. The reference to M.C. Chagla being selected as the Chief Justice of Bombay in supersession of K.C. Sen was an I.C.S. officer and the

then retiring Chief Justice of Bombay strongly recommended that the unbroken tradition of having only a member of the Bar as the Chief Justice of Bombay should be adhered to and Chagla who combined this qualification with exceptional calibre should be chosen.

Anyone familiar with the conditions in Britain, Australia and Canada, can only wonder at the temerity of our Government in citing those countries as examples to justify their action. In those countries, the tradition is firmly established that high calibre and sturdy independence are the essential pre-requisites in the Chief Justice, and the consideration whether his rulings would favour the executive or not is not only irrelevant but should be dismissed as pernicious.

The Law Commission of India cited with approval the observations made in the House of Commons by Sir Winston Churchill as the Prime Minister of England.

“The principle of complete independence of the judiciary from the executive is the foundation of many things in our island life.The Judge has not only to do justice between man and man. He also---and this is one of the most important functions considered incomprehensible in some large parts of the world---has to do justice between the citizen and the State. He has to ensure that the administration conforms with the law, and to adjudicate upon the legality of the exercise by the executive of its powers.”

In citing the above passage, the Law Commission emphasized “the need of guarding the independence of the judiciary from the executive”. So far from fulfilling this need, the Government’s decision amounts to making the Court’s rulings subservient to the executive’s approval.

The reference to the practice in the United States is irrelevant and misleading. The differences between that country and ours on this point have been adequately dealt with in the article by Mr. K. Subba Rao; and therefore they are not recapitulated here.

Even the final argument of despair resorted to by the Government---that they wanted a Chief Justice with a reasonably long tenure of office---is contradicted by the facts. Justice Grover would have retired on 12th February 1977, whereas Justice Ray will retire on 29th January 1977.

II

The speech of Mr. Mohan Kumaramangalam, the Minister for Steel and Mines, in the Lok Sabha on May 2, 1973, is wholly inconsistent with the Government’s first press briefing on April 25 and with the first speech of Mr. H.R. Gokhale, the Minister for Law and Justice, in the debate in Parliament. At first, Government led the people to believe that it had merely implemented the recommendation of the Law Commission; although the above-quoted passages leave no doubt that the Law Commission had recommended the appointment of such a Chief Justice as would give the right lead to the Supreme Court in sturdy judicial independence and fearless vindication of civil liberties against the executive. On the other hand, Mr. Kumaramangalam very frankly asserted, without mincing words, that the Government was motivated by the consideration that the Chief Justice should be one who would “help” the

Government and whose political philosophy would be “the most suitable” from the executive’s viewpoint.

Mr. Kumaramangalam’s great ability and personal integrity are beyond question. It is equally beyond question that his approach to the issue is against both the letter and the spirit of our Constitution.

First, he us consider Mr. Kumaramangalam’s plea that the Chief Justice must be one whose philosophy or outlook is “the most suitable” from the Government’s viewpoint. This means that the Chief Justice should be selected on the basis of his suitability, not from the viewpoint of the Constitution and the constitutional duties and functions he has to discharge, but from the angle of the executive. The Government of India is the single largest litigant in the whole country. It has more cases pending against it than any other party or authority. If this litigant can select judges suitable to itself, that would be the end of the judicial system which has till now served so admirably as the citizen’s bulwark against unconstitutional laws and arbitrary executive action. Speaking for the Government, Mr. Kumaramangalam has expressly stated that the Government wants judges “who can effectively work and help us in the Supreme Court”. This euphemism would eventually convert the Supreme Court into a subservient appendage to the executive.

Secondly, Mr. Kumaramangalam has in effect suggested that the Government is entitled to select judges who subscribe to the philosophy of the ruling party. Every government naturally thinks that it is forward-looking and its opponents are backward-looking; and Mr. Kumaramangalam says that in appointing the Chief Justice, “we are entitled to come to the conclusion that the philosophy of this judge is forward-looking and of that judge backward-looking and to decide that we will take the forward-looking judge and not the backward-looking judge”. In other words, what the Government virtually wants is that the Chief Justice should subscribe, not to the philosophy of the Constitution but to the philosophy of the ruling party. In all other democratic countries, a judge is expected to shed his political philosophy after he takes his seat on the Bench; whereas our Government expects our judges to adhere to or acquire a particular political philosophy after assuming judicial office. This attitude towards the judiciary is typical of communist countries where the judiciary has to be committed to the philosophy of the one and only party permitted to the philosophy of the one and only party permitted to function and where the judiciary exists to “help” the Government in implementing its programmes. It is also the philosophy of dictators and absolute monarchs like the old English kings who established the Star Chamber Court which was expected to “help” the king, be “suitable” to his needs and share his “philosophy” and “outlook” as regards the unfettered powers of the monarch. Experience should teach us that while it is desirable to inject justice into politics, it is disastrous to inject politics into justice.

A little reflection would show how utterly untenable is the Government’s claim that they are entitled to have Supreme Court Judges who subscribe to the ruling party’s philosophy. Suppose a party is in power whose philosophy differs from that of the Constitution; is the judge to uphold the philosophy of the Constitution or that of the ruling party? The Constitution requires the Supreme Court Judge to take an oath that he “will bear true faith and allegiance to the Constitution....and....will uphold the Constitution and the laws”. One of the hallmarks of our

Constitution is the great importance attached to fundamental rights and basic human freedoms. Some powerful political parties in India have no regard for the citizen's rights and civil liberties; and if the judge has to share the philosophy of such a ruling party, he would necessarily be false to his oath. The President of India would be equally false to his oath in appointing such a judge, since the President has to take an oath that he will to the best of his ability "preserve, protect and defend the Constitution". The very foundation of our Constitution is a free democracy with a free press and the right to dissent. Suppose the ruling party does not believe in the basic human freedoms, should the judge give his decision according to the Constitution or according to the "forward-looking" philosophy of the ruling party? Again, our Constitution believes in religious freedom. Assume the ruling party in power at a future date does not believe in religion or in religious freedom, should the judgements of the Supreme Court be in conformity with such "forward-looking" view?

The structure of our Constitution is federal or quasi-federal and the existence of autonomous States is basic to our Constitution. Under Article 131, the Supreme Court has original and exclusive jurisdiction in disputes between the Government of India and one or more States. If a "forward-looking" ruling party wants to have unified control over the whole country and abolish the institution of the States, must a forward-looking Chief Justice "help" the Government by a favourable decision upholding the requisite amendment of the Constitution as valid?

After a Supreme Court Judge is appointed, a new political party may come into power at the centre whose philosophy and outlook may be quite different from those of the out-going Government. Should the judge change his colours like a chameleon? Further, different political parties may be in power in different States. Chaotic conditions would prevail if the judges of different High Courts are equally expected to be "suitable" to the different parties in power in the States.

A committed judge is a contradiction in terms. You cannot have a committed judge any more than you can have boiling icescream. Either a man is committed or he is a judge in the true sense; he cannot be both. A man is wholly unfit to be a judge and is necessarily false to his oath unless his exclusive commitment is to the Constitution regardless of the outlook and changing fortunes of political parties.

Thirdly, Mr. Kumaramangalam referred to the "prerogative" of the Government to appoint that judge to be the Chief Justice whom it regards as the most suitable. "Prerogative" is an archaic concept which belonged to the feudal age. Kings and dictators, fascists and totalitarian rulers, have prerogatives, but not Ministers who are merely the democratically elected servants of the people. Our Constitution recognizes no prerogative whatsoever; it recognizes merely rights, duties and discretions. The difference between "prerogative" and "discretion" is clear. A person who has a prerogative can act arbitrarily or irrationally and yet his decision must be treated as legal and valid. On the other hand, if a person has the "discretion", and not the prerogative, to make a decision, the discretion can only be exercised fairly and reasonably; otherwise his act is void on the ground that there was no valid exercise of discretion in the eye of the law. The President of India has only a discretion in appointing the Chief Justice and other Judges; and neither the President nor the Cabinet has any prerogative in the matter.

Fourthly, Mr. Kumaramangalam has argued that the Government wants a Chief Justice who "is able to recognize that Parliament is sovereign; that Parliament's powers in relation to the future are sovereign powers". This ability required of the Chief Justice makes a mockery of the Constitution. Parliament has no unfettered sovereignty. The Constitution is supreme over Parliament; and not Parliament over the Constitution. The fundamental rights which are the basic human freedoms are fetters on Parliament's powers. The Supreme Court has itself held by a majority in the great Constitutional case decided on April 24, 1973, that Parliament has no power to amend the Constitution in such a way as to alter the basic structure or framework of the Constitution; and the Government's emphatic arguments to the contrary were expressly rejected. Mr. Kumaramangalam's statement amounts to a refusal to accept the law as laid down by the Supreme Court.

The Government still wants to have such judges in the Supreme Court as will recognize Parliament's claim to be supreme over the Constitution and to have the limitless power to make any amendment whatsoever to the Constitution,---even so as to convert India into a totalitarian State where civil liberties may no longer prevail. The executive's naïve plea is that Parliament may be trusted not to use the power to destroy the basic framework of the Constitution. The answer to this is contained in the words of W.B. Yeats: "No government has the right, whether to flatter fanatics or in mere vagueness of mind, to forge an instrument of tyranny and say that it will never be used".

It would be a work of supererogation to spell out the frightening consequences for the entire country if the executive is permitted to appoint judges who share the philosophy of the ruling party. Every judge of the Supreme Court would then be selected on such reprehensible considerations.

The various State Governments may well take the cue from the action of the Union. Already, there are some States where appointments even to the High Court are made on purely political considerations and supporters of the ruling party have been elevated to the Bench irrespective of merit. Up to now, the normal tradition has been to promote the seniormost Judge, to be the Chief Justice of the High Court and to promote the seniormost Presidency Magistrate to be the Chief Presidency Magistrate. These healthy conventions may now go by the board and disqualification for the highest post may become the calculated cost of judicial integrity.

In the Canadian Constitution there are no fundamental rights (apart from a new statute passed by the Canadian Parliament which is not relevant to the present discussion). Yet the Supreme Court of Canada struck down a law which interfered with freedom of the press on the ground that the Court was entitled to spell out an implied Bill of Rights, including the right to freedom of speech,---from the mere fact that in the Preamble to the Canadian Constitution it is recited that the Canadian Parliament is based on the model of the U.K. Parliament, which means the Parliament of a free democracy; and there cannot be a free Parliament without free elections, and there cannot be free elections without a free press. This decision continues to be the law of Canada upto date. No Canadian Minister would have any political future if he talked of that decision as amounting to a "confrontation" between the executive and the judiciary, to use a word which is so popular with our Ministers. This shows how, so long as there is a judiciary

marked by sturdy independence, the citizen's civil liberties are safe even in the absence of any express guarantees in the Constitution. But once the judiciary becomes subservient to the executive and to the ruling party's philosophy, no enumeration of fundamental rights in the Constitution can be of any avail to the citizen, because the Courts of Justice would then be replaced by the Government's Courts. "If the salt have lost his savour, wherewith shall it be salted?"

If the whole Chapter on fundamental rights were to be deleted, the damage to the future of democracy and civil liberties would not be so great as would ensue from flagrant erosion of judicial independence. In the last analysis, the final guarantee of the citizen's rights is not the Constitution but the personality and intellectual integrity of the Supreme Court Judges.