A Judge as a Philosopher
A Tribute to Justice P N Bhagwati
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The sheer audacity of Justice P N Bhagwati’s vision, philosophical rationale and futuristic imprint of judicial activism appear to be unparalleled. It provides a beacon of hope to us that much desired changes in the Indian legal system are possible. This can happen if conscientious judges with wider horizons can marshal ideas that are duly guided by taking the Constitution as an organic beacon of hope for betterment of the society at large.

In the legal annals of independent India, very few judges have left an indelible imprint on justice delivery system and legal mechanisms for societal betterment. One such iconic judge left, after a lifespan of 95 years, for his heavenly abode on 15 June 2017. In fact, Prafullachandra Natwarlal Bhagwati, who was born on 21 December 1921, was a restless legal crusader, who turned his tenure as a judge of the Supreme Court into a unique opportunity to give effect to some of the embedded aspirations of the founding fathers of the Indian Constitution. His illustrious father, N H Bhagwati, served as a Supreme Court judge (1952-59) as well as Vice-Chancellor of the University of Bombay. Known popularly as P N Bhagwati, he served on the Supreme Court for 13 long years. He became the 17th Chief Justice of India and served from 12 July 1985 until his retirement on 20 December 1986.

Understanding Bhagwati

When I initially toyed with the idea of writing a tribute for Bhagwati, it was noticed that many people have a hazy idea about the depth of contribution and legacy of Bhagwati. It led to my effort to unravel the impact that has left on the judicial architecture of India. Hence, keeping in mind the fact that the Supreme Court is a human-built institution, and there could be human limitations in judges, this short write-up aims at finding grain from the chaff that comes in the way of deciphering aspects of Bhagwati’s role as a judge of the apex court.

He served on the Supreme Court during momentous periods of Indian history including internal Emergency (1975-77) that clouded and shook the foundations of the apex court
itself. In fact, following nullification of election of the then Prime Minister Indira Gandhi, the Supreme Court witnessed a “purge” of judges. Hence, under the shadow of Emergency, it was not surprising that Bhagwati became part of the seven judge bench majority that upheld the presidential order of 27 June 1975 in Additional District Magistrate, Jabalpur v S S Shukla, etc (1976) (ADM Jabalpur case)\(^1\) that took away the right to move even a writ petition to challenge legality of any detention.

Bhagwati was stung by criticism for his stance in ADM Jabalpur case as well as the purported letter he wrote to the then Prime Minister during the Emergency. He is reported to have admitted later that siding with the majority in that case was against his conscience.

**Empathy for the Underprivileged**

Notwithstanding the above, Bhagwati’s real self came to the fore in his deep empathy for the poor and the underprivileged. It came to be reflected in the tools and techniques of justice delivery such as providing free legal aid to undertrial prisoners. In fact, he was clear in his mind that a judge needs to be guided by his own “social philosophy.” He saw this as essential for the role of a judge in a traumatically changing society such as India. It is this concern that, in the post-emergency period, led him to gravitate towards unshackling access to justice for the benefit of the large mass of the Indian humanity.

It was borne out of his passion to defy the traditional myth that “judges do not make law, that they merely interpret law.” It was this simmering quest to find his gravitas that got ignition from socially conscious lawyers like Kapila Hingorani. Hingorani filed habeas corpus petition on 11 January 1979 in the Supreme Court on behalf of 19 undertrial prisoners on the basis of reports published by K F Rustomji, Member of National Police Commission, in the Indian Express (Cunningham 2003: 85). Her petitions took the shape of Hussainara Khatoon >(Hussainara Khatoon (IV) v Home Secretary, State of Bihar (1980) and Khatri(Khatri v State of Bihar 1981) cases that set the ball rolling for liberalisation of rule of locus standi. The rest is history.

**Liberalisation of Locus Standi**

Bhagwati’s moves for radical changes in the process and structure of access to justice in the higher judiciary found theoretical basis in the writings of eminent scholars like Upendra Baxi, who chose to call the litigation by public spirited individuals as “social action” (Baxi 1979–80). Seeds of this idea, it seems, were sown early on by V K Krishna Iyer in Mumbai Kamgar Sabha (Mumbai Kamgar Sabha, Bombay v M/S Abdulbhai Faizullahbai & Ors 1976), where it was held that as “procedural prescriptions are handmaids” and since the “workmen compendiously projected and impleaded through the union,” any formal defects of locus standi must fade away in the larger interest of justice. The credit, however, goes to Bhagwati for providing flesh and bones as well as a constitutional basis to the idea of public interest litigation (PIL). According to Desai “In fact Justice Bhagwati is considered to have
given a comprehensive exposition” (Desai 1993b: 29) to the concept of PIL.

Several sceptics have sought to deride such judicial flexibility on the grounds such as ideology, procedural purity, resistance to judge-made law and finding fault with breaking out of traditional judicial function. This appears to be prompted by perceived threat to the status quo and challenge to the interests of the privileged few. Notwithstanding this, Bhagwati’s faith in providing access to justice was unshakable. He thought that judges do need to take part in the law-making process and regarded judicial activism as a necessary and inevitable part of a judge’s role. It irrevocably transformed the legal landscape. As a result, PIL came to be used as a tool to wage legal battles against a host of ills in the Indian society such as state repression, governmental lawlessness, administrative deviance, exploitation of disadvantaged groups and denial of basic human rights and entitlements, and in recent decades on protection of the environment.

**Judicial Activism**

It was Bhagwati who painstakingly sought to underscore and justify judicial activism since judiciary is one of the pillars of the Indian republic. He was so convinced that, in his address on 3 October 1984 at Columbia University School of Law, Bhagwati emphasised that judicial activism is an undeniable feature of the judicial process in a democracy and the only relevant question is what should be the degree and extent of judicial activism permissible to a judge. (1984–85: 562)

When the initial taboo concerning the age-old notion of locus standi was broken, it opened floodgates of litigation by way of writ petitions pertaining to contravention of a constitutional or a legal provision or an act without authority of law or even without following the due process of law. As a corollary, in S P Gupta v President of India and Ors 1982 case, the Supreme Court spelled out contours of this new tool to redress many ills prevailing in India’s peculiar socio-economic milieu and observed:

such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for appropriate direction, order or writ in the high court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons. (S P Gupta v President of India and Ors 1982: 189)

Faced with a lot of criticism from proponents of status quo, Bhagwati put up a strong defence of philosophical vision for an Indian judge. He sought to provide convincing
rationale as follows:

The modern judiciary cannot afford to hide behind notions of legal justice and plead incapacity when social justice issues are addressed to it. This challenge is an important one, not just because judges owe a duty to do justice with a view to creating and molding a just society, but because a modern judiciary can no longer obtain social and political legitimacy without making a substantial contribution to issues of social justice. (Bhagwati 1984–85: 566)

It needs to be noted that his idea of judicial activism was not barren. It comprised the valuable role a socially conscious litigant would play in taking risk as well as spending time and effort in filing genuine PILs. So, when he saw a public spirited lawyer like M C Mehta spending precious years of his life in valiantly pursuing litigations such as M C Mehta and Anr v Union of India & Ors (1987) (popularly known as Shriram Oleum Gas Leakage case), he did not fail to make special provision for payment of some cost, as a token of appreciation to the apex court. It was so typical of Bhagwati. In the course of the conversation, he did once underscore this in chaste Gujarati: Bapdo Mehta mahenat karine mari jay chhe (poor Mehta really makes tireless effort). It has been etched in my mind forever as a classic example of his sensitivity and concern both for the cause and the person, who took the trouble of bringing case to the portal of the apex court.

When Bhagwati took over as the Chief Justice of India, his presiding over the five-judge constitution bench in the Shriram Oleum Gas Leakage case became pinnacle of his lasting legacy. This became one of the momentous decisions in the history of the apex court, wherein strong imprint of Bhagwati can be clearly seen. Riding on the unanimous view, he went on to hold that:

Procedure being merely a hand-maiden of justice it should not stand in the way of access to justice to the weaker sections...this Court will not insist on a regular writ petition and even a letter addressed by a public spirited individual or a social action group acting pro bono publico would suffice to ignite the jurisdiction of this Court. (M C Mehta v Union of India 1987: 1090)

It appeared as if the Court was bending over backwards to shed its image of being “an arena of legal quibbling for men with long purses” (His Holiness Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and Anr 1970).

**Legal Engineering**

Premised on the belief that judicial activism is necessary and inevitable part of the judicial process, the fine legal engineering resorted to by Bhagwati essentially revolved around Articles 12, 21 and 32 of the Constitution.
With his wider horizons, he embarked upon the task of deciphering the meaning of life itself and deduced that it must comprise all finer graces of civilisation. It led to the reading of several hidden aspects of life in Article 21 such as procedural due process, right to free legal aid, right to clean and hygienic environment, etc. It amounted to judicial creativity at its best. In fact, in the last Constitution bench judgment that he wrote is a judicial masterpiece of innovation and boldness as to how a judge could leave his footprint on the sands of the nation’s legal history. In the Constitution bench judgment in Shriram Oleum Gas Leakage, Bhagwati’s fierce sense of pride and quest for the apex court’s place on the global map can be seen in his drawing of a futuristic trajectory. He candidly observed:

this Court should be prepared to receive light from whatever source it comes, but it has to build up its own jurisprudence, evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. (M C Mehta v Union of India 1987)

As a corollary, in a bold move, Bhagwati proceeded to bypass the rule laid down in 1868 in Rylands v Fletcher and introduced a new principle of “strict and absolute liability.” Some critics did feel that this was done keeping in mind pending litigation in the Bhopal Gas Leakage Disaster case (Desai 1993a). It was also no less significant that he expounded on the scope of Article 12 (definition of State) and justified such “expanded horizon of Article 12” primarily to inject respect for human rights and social conscience in the Indian corporate structure. He also made it clear that Article 32 does not merely provide for enforcement of fundamental rights, but also comprises significant scope for remedial justice. The scope for such remedial justice was left to be guided by exigency of the situation and wisdom of the Supreme Court judges from time to time.

Ahead of Time

Even as people around the world marvel at the advent in 2010 of the National Green Tribunal (Desai and Sidhu 2010), very few realise that the innovative idea was first mooted by Bhagwati in 1986 in the Shriram Oleum Gas Leakage case. He felt it was necessary to set up environmental courts in India on a regional basis, along with an ecological sciences research group (as compared to ad hoc practice of appointing commissioners). It shows as to how Bhagwati was far ahead of his time not only in expanding the scope of existing principles, but also in crafting new principles by jettisoning antiquated rules and giving concrete impetus to an idea that many others had not even remotely thought about. The vision and approach of Bhagwati did stand apart.

As a student, the author had the privilege of interacting with Bhagwati on some occasions. It was he who advised me not to give up the quest for legal scholarship. So, when he came to the Jawaharlal Nehru University some years ago, in the course of a brief interaction, when I asked him: “Was it right to give up the idea of legal practice and focus full time on teaching and research in international law?” He characteristically replied: “Absolutely! A legal
practitioner does preparation that is limited to a brief and argues it for a client. You were destined to play much larger role in contributing to legal knowledge.” It was a crystal clear Bhagwati way of thinking aloud and ahead as well as placing higher value on nurturing our dwindling knowledge base.

**Beacon of Hope**

It is the lasting legacy of Bhagwati that he transformed much of the human rights jurisprudence into environmental jurisprudence (Desai 1986). After Bhagwati’s retirement (20 December 1986), the torch was duly carried forward by several learned justices of the Supreme Court. Among them was Kuldip Singh, who, from being reluctant to accept the idea of PIL in environmental cases, became one of its most vociferous supporters and laid down that sustainable development, precautionary principle and polluter pays principle are part of the law of the land (Vellore Citizens Welfare Forum v Union of India & Ors 1996).

The sheer audacity of Bhagwati’s vision, philosophical rationale and futuristic imprint of judicial activism appear to be unparalleled. It provides a beacon of hope to us that much desired changes in the Indian legal system are possible if conscientious judges with wider horizons can marshal ideas that are duly guided by taking the Constitution as an organic beacon of hope for betterment of the society at large. It could help us to overcome current challenges such as decline in the legal knowledge base, pile up of cases, corruption as well as the very legitimacy of the collegium system of judicial appointments in 21st century India that aspires to sit on the global high table. We only need to draw inspiration from Bhagwati’s bold, innovative and futuristic approach to come out of the current morass.

**NOTES**

1 The judgment of the ADM Jabalpur case 1976 was Delivered by the five-judge bench of A N Ray (the then Chief Justice of India), H R Khanna, M H Beg, Y V Chandrachud and P N Bhagwati on 28 April 1976.

2 The House of Lords Judgment was Delivered by the Lord Chancellor (Lord Cairns) and Lord Cranworth (1868): LR 3 HL 330; available at: [http://www.bailii.org/uk/cases/UKHL/1868/1.html](http://www.bailii.org/uk/cases/UKHL/1868/1.html).

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