

IT LIES IN YOUR HEART:

Rule of Law And Our Role In Enforcing It

(This text of speech was delivered by Justice Yatindra Singh, Chief Justice, Chhattisgarh High Court at the valedictory function of the Regional Judicial Conference on 'Role of Courts in upholding the Rule of Law ' (East Zone) at Bilaspur on 30th March, 2014)

'Genius is one percent inspiration, ninety-nine percent perspiration.' These are the words of Thomas Alva Edison (February 11, 1847 – October 18, 1931), the greatest inventor of all times. He had more than a thousand US patents in his name and many patents in the United Kingdom, France, and Germany. His inventions established major new industries world-wide, notably among them are the industries relating to electric lights, power utilities, sound recording, and motion pictures.

Edison also invented incandescent bulb. He experimented with many combinations for suitable filament before he found one. During his trial and error period, his friends asked him if he hadn't failed in his many attempts. 'No', he answered and explained, 'I have found out what will not make a good filament.'

For the last two and half days, we have discussed what is 'rule of law' and what is the 'role of the courts in upholding it'. Let us look into, what is not 'rule of law' and how the courts abdicated their role in enforcing it. This was best illustrated during internal emergency (26, June 1975 to 21, March 1977).

I, not only witnessed it, but have gone through it. My father, a Senior Advocate at Allahabad, was first arrested under the Defence of India Rules (DIR) and when he was granted bail under DIR, he was preventively detained under the Maintenance of Internal Security Act (MISA), similar to what the National Security Act (NSA) is today.

During internal emergency, there was a complete break down of rule of law. It reminded one of George Orwell's 'Nineteen Eighty four'.

False documents and false FIRs were officially prepared stating that the respectable citizens, senior advocates, teachers, professors, businessmen, journalists, political thinkers were trying to steal the electric wires or burn the post offices, courts, collectorate, banks and other public institutions.

In one of his letters to me, Nani Palkhiwala (January 16, 1920 – December 11, 2002) summed up the atmosphere during internal emergencyas, '[I]t was a time of total despair to be a witness to the wrongs that were done to the people.' (See **Appendix-1** for my letter and response from Palkhiwala).

Never in the history of our country, the police as well as the bureaucracy debased itself to such an extent, not even during the British time. This was, what is 'not rule of law'.¹ It led to the downfall of police and the bureaucracy, where it stands today. The good thing is that some of them do realise the malaise that they have fallen into and stand up to the pressure but suffer the fate of frequent transfers and sometimes of or suspension.



Nani Palkhiwala

At that time, rule 194(b) of the DIR dealt with grant of bail. It provided that if there was a contravention of the rules or the orders made there-under and in case prosecution opposed the bail application, then bail might not be granted unless the Court had reasonable grounds for believing that the accused was not guilty of such contravention.

During that period, all bail applications were strongly opposed. All FIRs were similar, if not the same. Every one knew these cases were false. Yet, the bail applications were rejected. This was example of the courts abdicating their role in enforcing rule of law.

It was only, when some judges in the High Court (Justice JP Chaturvedi and Justice MP Saxena in the Allahabad High Court) gathered courage to pierce the veil of deceit that others started granting bail; it was then the courts understood their role.

Justice MP Saxena would often say that rule 194(b) works the other way round. According to him all these FIRs were false, unless proved to the contrary.

1 The Shah commission in its three reports concluded that the provisions of the MISA and the DIR were misused. It observed,

'The decision to arrest and release certain persons were entirely on political considerations which were intended to be favourable to the ruling party. Employing the police to the advantage of one party is a sure source of subverting the rule of law.

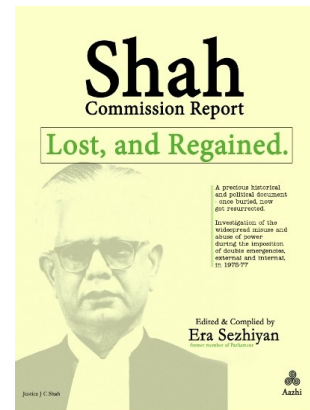
...

Even the cream of the talent in the country in the administrative field often collapsed at the slightest pressure ...forging of records, fabrication of ground[s] of detention, ante-dating detention orders, and callous disregard of the rights of detainees as regards revocation, parole, etc.'

No one came out of jail, even after grant of bail: they were preventively detained. If you haven't gone through that hell, it is difficult to imagine the terror and the state of affairs during those times.

The Shah Commission is an authoritative account of the happenings during internal emergency. It records, 'The one single item which had affected the people most, over the entire country was the manner in which the power under the amended MISA was misused at various levels.'

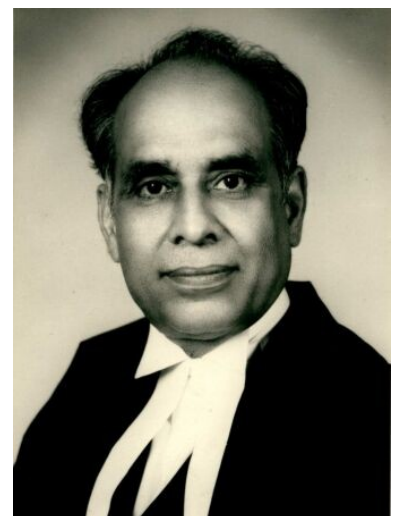
This became possible because of the decision of the Supreme Court in ADM Jabalpur Vs Shiv Kant Shukla. A.I.R. 1976 S.C. 1207 (the Habeas Corpus case).



Writ of Habeas Corpus has been described as 'a key that unlocks the door to freedom.' In the Habeas Corpus case, the question was whether in the light of suspension of Article 14, 19, 21, and 22 of the Constitution, writ of Habeas Corpus was maintainable or not.

Article 21 guarantees life and liberty. Despite its suspension, all High Courts, where the question came up (nine to be precise), held that the State was bound to follow the law. In case of violation of law, Habeas Corpus was maintainable.

But the unanimous view of the High Courts was overruled by the majority (4:1) of the Supreme Court in the Habeas Corpus case. The Supreme Court in substance held that courts could do nothing even if the State acted contrary to law; they should be helpless spectators: a result—acknowledged to be wrong—even by those who held it.



Justice HR Khanna the lone dissenting Judge in the Habeas Corpus case

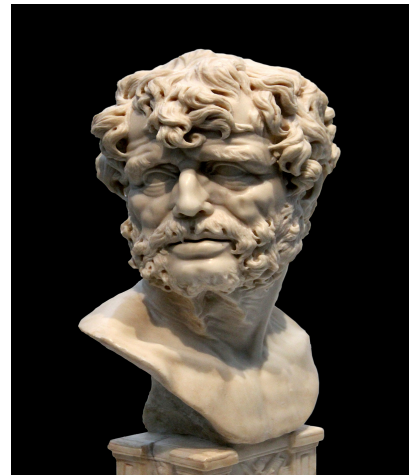
Seervai in *Constitution of India*: Appendix Part I The Judiciary Of India rightly pointed out, 'the High Courts reached their finest hour during the emergency; that brave and courageous judgements were delivered ... the High Courts had kept the doors ajar which the Supreme Court barred and bolted'.

The High Courts, rightly understood the 'role of the courts' in enforcing 'the rule of law', but majority of the highest court of the land did not. Why did the best democracy in the world; the finest bureaucracy; the strong media; the most learned and able Judges failed us? But before I tell you about it, few words about the most fundamental principle of role of the courts in enforcing rule of law and how it came out.

'Fiat justitia, ruat coelum (रुएट युस्टिटिया रुएट सीलम); meaning, 'Let justice be done, though heavens may fall'. It is fundamental in rule of law but its origin is dishonourable; it was used to excuse the most outrageous injustice. Lord Denning has traced its origin in his autobiography 'The family Story'.

Seneca (4 BC–65 AD) was a Roman Stoic philosopher, statesman and dramatist. He wrote many tragedies. In one of them (Dialogues, III, 18) Piso sentenced a soldier to death for the murder of Gaius. He was ordered to be executed. When the soldier was about to be executed, Gaius came forward; he was alive. The commander, who was to execute the sentence, reported it to Piso. He sentenced all three to death:

- The soldier because he had already been sentenced;
- The commander for disobeying orders; and
- Gaius for being the cause of the death of two innocent men.



*Bust of Seneca from
Wikipedia*

Piso justified his decision on the principle Fiat justitia, ruat coelum—Let justice be done, though the heavens should fall.

Lord Denning in his autobiography describes some other such instances.

The reason that I told you this story was, every failure of justice, every violation of the rule of law has a lesson and a silver lining. So has the failure of rule of law during internal emergency.

Fali S. Nariman in his book 'The State of Nation' sums up the lesson as follows:

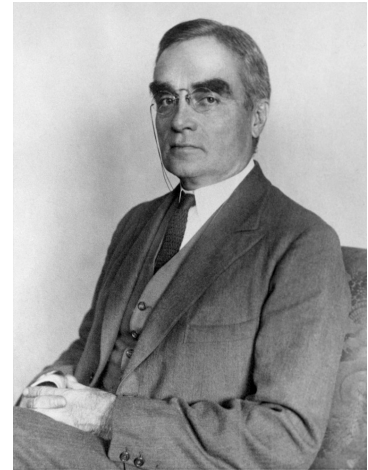
'One of the lessons of the internal Emergency has been not to place excessive reliance on constitutional functionaries. They failed us – the president, ministers of the government, most of the Members of Parliament and even senior judges of our Supreme Court: the latter for their majority judgment (4:1) delivered in April 1976 in ADM Jabalpur—upholding the Proclamation of internal Emergency. Nine high Courts in the country had struck down the Proclamation but all their judgments were overturned in ADM Jabalpur.

If I may quote Learned Hand (January 27, 1872 – August 18, 1961)², the silver lining is,

'Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.'

Liberty is a facet of rule of law. What Learned Hand said about liberty is true about rule of law—it lies in your heart.

For the last two and half days you have imbibed, what is rule of law and what is our role in upholding it. Cherish it; keep it close to your heart; and apply it in your decisions.



Learned Hand

Before I end, I would like to tell you about Justice HR Khanna, the lone dissenting judge in the Habeas Corpus case.

Nariman in his book 'The State of the Nation' compares the Habeas Corpus case with Dred Scott v. Sandford, 60 U.S. 393 (1857) that led to election of Abraham Lincoln as the President of US and then to the civil war. But I would prefer to compare it with Liversidge Vs Anderson 1941 (3) ALLER 338 (the Liversidge case) and Justice Khanna's dissent with that of memorable and historic dissent of Lord Atkin in the Liversidge case.

In the dissent, Lord Atkin observed,

'I view with apprehension the attitude of judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive,....

In England, amidst country the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that judges are no respecters of persons, and stand between the subject and any attempted



Lord Atkin

² This was in a speech "The Spirit of Liberty" - at "I Am an American Day" ceremony, Central Park, New York City (21 May 1944)

encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the court of King's Bench in the time of Charles I.

I protest, even if I do it alone, against a strained construction put upon words, with the effect of giving an uncontrolled power of imprisonment to the minister. To recapitulate the words have only one meaning. They are used with that meaning in statements of the common law and in statutes. They have never been used in the sense now imputed to them. ...

I know of only one authority which might justify the suggested method of construction. 'When I use a word' Humpty Dumpty said in rather scornful tone, 'it means just what I choose it to mean, neither more nor less'. 'The question is' said Alice, 'whether you can make words mean different things'. 'The question is', said Humpty Dumpty, 'which is to be master that's all'... the question is whether the words 'if a man has' can mean 'If a man thinks he has', I am of the opinion that they can not, and the case should be decided accordingly.'

Justice Michael Kirby retired as a judge of the Highest court in Australia. In one of his e-mails to me, he wrote,

'I was specially moved [by] the dissent of Justice Khanna in the Supreme Court in the habeas corpus [case].

... About five years ago, I called on him [Justice Khanna] in Delhi and (to his embarrassment) bent down and kissed his feet. He is, as you say, an example to all judges of the essence of what is to be entrusted with the judicial seat.' (see **Appendix-II** for the full text of the email)

With one judgment, Justice Khanna became more famous, more respectable, more celebrated than any judge to have ever adorned the bench in our judiciary.

In the front page editorial at that time, the New York Times remarked, 'surely a statue would be erected to him in an Indian city'.

Wish you all the best in your life. May you go on to follow 'rule of law' and become a judge like Justice HR Khanna.

Jai Bharti, Jai Hind.

APPENDIX-I

Soli Sorabjee and Arvind P Datar have written a book 'NANI PALKHIVALA The COURTROOM GENIUS'. It is published by Lexis Nexis Butterworths Wadhwa. In the book there is a chapter 'The Habeas Corpus Case: Palkhivala's Critical Absence'. In this they explain the reason for non-appearance of Palkhivala as follows:

'Sorabjee and other advocates had requested Palkhivala to come to appear in the Court. Palkhivala's response was that there was no way that the Court would allow the appeals of the Government especially after seven High Courts delivered well-reasoned decisions in favour of the citizens. His view was that it was an open and shut case and nothing would be gained by his appearing before the Supreme Court. Palkhivala felt that Chief Justice Ray and Justice Beg would possibly hold in favour of the Government. He was completely confident about Justice Chndrachud and Justice Bhagwati holding in favour of the citizen. Indeed, ironically, he felt that it was Justice Khanna who could be "the dark horse" but could be persuaded to dismiss the appeal and uphold the right to liberty.'

This reason does not appear to be correct.

I was present in all conferences in Delhi and during arguments in the Habeas Corpus case before the Supreme Court. At that time, there were two versions as to why Palkhivala did not appear in the Habeas corpus case.

After twenty years of the decision, I had written an article 'The Habeas Corpus Case' as to what was the controversy; what was decided in the case; what happen to the lawyers and judges, who appeared and decided that case. It is published in the book 'A lawyer's World and Childhood Dreams'.

Before writing the article, I had written a letter to Palkhivala requesting him to disclose the reason for his non-appearance. Palkhivala's answer suggests otherwise than mentioned in the book by Soli Sorabjee.

My letter dated 22.12.96 was as follows:

Dear Mr. Palkhivala,

Date: 22.12.1996

Thank you for your letter dated 19th Nov, 1996. I am interested in writing and have written few articles. I want some information about an article relating to the Habeas Corpus case that is ADM Jabalpur Vs Shiv Kant Shukla, AIR 1976 SC 1207.

My father Mr. VKS Chaudhary is Senior Advocate. He was detained during emergency and we had filed Habeas Corpus. As you know, we lost the case before

the Supreme Court. You did not appear in these cases. Many of us believe that we might have won the case had you appeared in the matter. What was the reason for your non-appearance. There are two versions, which I had heard: which one is correct or was there any other reason.

The first one 'Mr. Palkhiwala had agreed to appear before the Supreme Court for the detenues and was to be informed. But unfortunately under some confusion he was not informed and as such could not appear'.

The second version 'Mr. Palkhiwala was contacted (probably by Nana Ji Deshmukh) but he said that he works when laws and Constitution is followed. Since nothing is being done which is legal, he expressed his inability.'

I am also enclosing copies of two of my latest articles. The first one 'In the matter of Epimendes' is an inter disciplinary study. It discusses impacts of paradoxes in the field of Mathematics, Literature, Philosophy and on jurisprudence. It examines the connection between one of the oldest and the most talked about paradoxes namely 'liar's or Epimendes' paradox' and the decision making process.

The second article, 'In the matter of a judge' traces history of law in respect of liability of judges while acting judicially.

Thanking you,

Yours faithfully,

(YATINDRA SINGH), 37, Tashkent Marg, Allahabad-210001.

The scanned copy of the reply of Nani Palkhiwala is as follows

January 13, 1997

Dear Yati,

Thank you for your letter of the 22nd December 1996, along with the enclosures. I can see from your articles that you are better read than most advocates and lawyers.

You have mentioned two versions about my not appearing in the Habeas Corpus cases during the Emergency. If I may say so, both the versions are wrong. I would like to set the record straight.

I was asked to appear in those cases. But I am sorry to say that being aware of the lack of moral courage on the part of the judges of the Supreme Court during the dark days of the Emergency, I decided not to appear in the case of A.D.M. Jabalpur. What I am saying now is exactly what I told the Supreme Court in written Propositions which I filed on behalf of the citizen. Those Propositions are set out verbatim on pages 183-189 of my book "We, the People". I have summarized there the case for construing the Constitution in such a way that "tyranny and despotism shall not masquerade as constitutionalism". I had a very strong feeling that no purpose would have been served by my appearing ⁱⁿ the case at that time. We had a Bench of hopelessly weak judges who would have done anything to gain the favours of the then government, the only exception being Justice H. R. Khanna who luckily is still with us.

For me, personally, it was a time of total despair to be a witness to the wrongs that were done to the people. As you yourself mention, Justice Chandrachud gave a judgment which he later admitted was erroneous. To my mind, he did not have the intellectual integrity and the moral courage to give the right judgment at that time.

If corruption and criminalization have engulfed the country today, it is in no small measure due to the misdeeds of the government of Mrs. Indira Gandhi who did greater harm to the country than all the other Prime Ministers put together. I feel sorry to have to say that, but I cannot help venting my feelings at the type of tyranny which prevailed during the Emergency.

I would have certainly appeared in A.D.M. Jabalpur's case if I had any hope that the Supreme Court judges would act judiciously and in an impartial manner.

With best wishes, and renewed thanks for taking the trouble to write to me,

Yours sincerely,



Nani A. Palkhivala

Shri Yatindra Singh,
Advocate,
37, Tashkent Marg,
Allahabad 210 001.

The letter of Nani Palkhiwala is self-explanatory.

APPENDIX-II

Email of Justice Michael Kirby, Judge, High Court of Australia.

Dear Yati,

Wed, 23 Feb 2005

It was a great pleasure to meet you in Bhopal. Your splendid book 'A Lawyer's World' was my companion on the long journey home to Australia. Thank you for giving it to me.

I was special moved by your essay on dissent and in particular the dissent of Justice Khanna in the Supreme Court in the habeas corpus application during the Emergency.

I met Justice Khanna in Australia soon after this celebrated case. About five years ago, I called on him in Delhi and (to his great embarrassment) bent down and kissed his feet. He is, as you say, an example to all judges of the essence of what it is to be entrusted with the judicial seat. Thank you for writing in such a vivid way about him.

Thank you also for comments on issues of sexuality. I liked the way that you weaved science and reality into your legal thinking. I hope that we will meet again and that, meantime, your career will continue to flourish and your life be full of happiness.

Sincerely,

Michael Kirby

Books referred

1. Nineteen Eighty four by George Orwell;
2. Shah Commission of Inquiry Intrim Reports-I & II and Final Reports (SHAH COMMISSION REPORT — Lost, and Regained: compiled and edited by Era Sezhiyan);
3. Constitution of India: Appendix Part I The Judiciary Of India by HM Seervai;
4. The family Story by Lord Denning;
5. The State of Nation by Fali S Nariman;
6. Learned Hand: The Man and the Judge by Gerald Gunther;
7. Lord Atkin by Geoffrey Lewis;
8. Alice Through the Looking-Glass by Lewis Carroll.