COLLECTED SPEECHES OF JUSTICE P N BHAGWATI

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ENCOUNTER

I can remember very clearly my first meeting with Justice P N Bhagwati (or the "Chief", as so many judges still affectionately and respectfully call him).

I had just completed a decade as the foundation Chairman of the Australian Law Reform Commission. I was beginning a new decade of service as the President of the New South Wales Court of Appeal - the busiest appellate court in Australia. It was late 1984. Justice Bhagwati, the intrepid traveller, was making a visit to Sydney, Australia. At a judicial reception, we fell into conversation. I

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* Justice of the High Court of Australia. Member of the International Bioethics Committee of UNESCO. Lately President of the International Commission of Jurists and Special Representative of the Secretary-General for Human Rights in Cambodia.

noticed at once his sharp intelligence, incisive voice, boundless energy and intellectual curiosity.

I told him of the case which had just been argued before the Court of Appeal. It concerned the question whether, by the common law in Australia, an official, acting under legislative power, was obliged to provide reasons for a decision adverse to the interests of an individual. The Australian courts had held that a judicial officer was obliged to provide reasons for an adverse decision[1]. However, the obligations of administrators were much less certain. In England (from which Australia's common law derived) Lord Denning MR, like Justice Bhagwati, a champion of reform, had concluded that, sometimes, administrators were so obliged[2]. But the majority judicial opinion in that country suggested that there was no such obligation, unless Parliament specifically provided it[3]. The position had been complicated in Australia by the passage of Federal legislation, affording persons affected by adverse decisions of Federal

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1 *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 388.

2 *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 (CA) at 190-191.

3 *Reg v Gaming Board; Ex parte Benaim* [1970] 2 QB 417 at 430-431; *Payne v Lord Harris* [1971] 1 WLR 754 at 764-765.

administrators, the right to obtain reasons for such decisions[4]. However, that legislation did not extend to New South Wales.

As I outlined the problem to Justice Bhagwati, I could see his eyes, with luminous intelligence, following my exposition of the case. He put his delicate hands into a position of repose. And he began to explain to me developments of the law in the Supreme Court of India. In particular, he explained the outcome of two leading cases: *Siemens Engineering and Manufacturing Co of India Ltd v Union of India*[5] and *Maneka Gandhi v Union of India*[6].

Newly inspired by this encounter, I went back to my task of writing my opinion in the case in hand[7]. I reviewed common law decisions in Australia and England, in the United States of America, Canada, New Zealand and Fiji. By reference to the unique briefing provided by a uniquely informed colleague, I turned to the jurisprudence of the Supreme Court of India[8]:

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4 *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 13; cf *Administrative Law Act* 1978 (Vic), s 8; *Tribunals and Inquiries Act* 1971 (UK), s 12.

5 AIR 1976 SC 1785.

6 AIR 1978 SC 597.

7 *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447 (CA) per Kirby P and Priestley JA; Glass JA dissenting.

8 *Ibid,* at 461.

> "In *Siemens* Bhagwati J said that the rule requiring reasons to be given was "like the principle of audi alteram partem, a basic principle of natural justice. (at 1789). The role of 'natural justice' in administrative law as an important principle intended to "invest law with fairness and to secure justice. It was stressed by Bhagwati J in *Maneka Gandhi* (at 625). Calling on the language of Lord Morris of Borth-y-Gest in *Wiseman v Borneman* [1971] AC 297 at 309, Bhagwati J suggested that the 'soul of justice is 'fair play in action' and that is why it has received the widest definition throughout the democratic world. In that case the Supreme Court of India held that the Passport Authority was obliged to supply reasons for impounding the passport of Mrs Maneka Gandhi. The case is complicated by the reference to the Indian Constitution and various statutory provisions. However, the basis for the obligation to provide reasons would appear to have been expressed to lie in the duties of or akin to those imposed in this country by the rules of natural justice".

Alas, when the majority decision in favour of the right to reasons of the Court to Appeal was taken on appeal to the High Court of Australia, that Court unanimously reversed our decision[9]. Giving the leading judgment, the Chief Justice of Australia (Sir Harry Gibbs) said that there was no general rule of the common law or principle of natural justice that required reasons to be given for administrative decisions, even those made in the exercise of a statutory discretion and liable adversely to affect the interests, or defeat the legitimate or reasonable expectations, of others. As to the decisions of the Supreme Court of India to which I had referred, Chief Justice Gibbs was unimpressed:

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9 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.

> "Fourthly, Kirby P referred to a line of Indian decisions in which it has been held to be 'settled law' that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes": *Seimans Engineering and Manufacturing Co of India Ltd v Union of India*[10]. This, it was there said, is "a basic principle of natural justice". These decisions appear to state the common law of India, although without a detailed knowledge of the course of decisions in that country it would be hazardous to assume that they have not been influenced by the provisions of the Constitution of India or by Indian statutes".

So my first intellectual encounter with Chief Justice Bhagwati (as he had become) led, ultimately, to n affirmative outcome. And yet is this so? Every decision of the courts - and especially of the higher courts of every country - contributes to the intellectual ferment that is the system of the common law in action. The idea that it should be attributed to the legislature, in affording a discretion or power to an official, to act under statutory power, that such official will give reasons to those adversely affected by such action, continues to appeal to the intellectual support of judges in Australia and beyond. The settled authority of the Australian courts is that stated by Sir Harry Gibbs. But the common law is a marvellous creative instrument of justice. It is pushed forward, and its boundaries are extended, by lively intellects such as Justice Bhagwati's. I never forgot that first encounter. In many subsequent

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[10] (1976) 63 AIR (SC) 1785 at 1789.

meetings, I have never lost the admiration for the lively intelligence and deep commitment to justice of the "Chief".

ENLARGEMENT

In the years since 1984, I have met Justice Bhagwati on many occasions and worked closely with him in international meetings and colloquia. But no enterprise was so important as that which he summoned together at Bangalore in 1988. That was where the *Bangalore Principles* on the Domestic Application of International Human Rights Norms were formulated. Here was Justice Bhagwati, in brilliant symbiosis with Mr Anthony Lester QC of England (now Lord Lester of Herne Hill). The impact of that meeting in Bangalore in 1988 had been enormous. And it is continuing.

Justice Bhagwati was puzzling over the relationship between the growing body of international human rights law and the domestic law of each nation state. The orthodox view of the common law of England had been that the two systems of law were separate and worked on different planes[11]. But could this "dualist" theory be maintained in a world in which international human rights law was

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11 Explained R Higgins, *Problems and Process - International Law and How We Use It* (1994), Oxford, Ch 12 "The Role of National Courts in the International Legal Process".

growing so rapidly? Should a reconciliation now be attempted between the two systems, out of a recognition of the necessity that each should work in harmony with the other?

As the judges met in Bangalore, under the guidance of Justice Bhagwati, a consensus was fashioned which was to have great influence throughout the common law world. The *Bangalore Principles* acknowledged that, international law was not part of domestic law unless dually incorporated into domestic law - usually by valid legislation. But the principles went on to suggest a new and innovative rule which would promote harmonisation of the two systems. Thus, if legislation were ambiguous, it would be consistent with the function of a judge in a common law system to resolve the ambiguity by reference to international human rights principles. If there were a gap in the common law, it would be consistent with the functions of such a judge to have regard to established rules of international law, particularly as to human rights, in filling the gap and providing the development of the common law relevant to the case in hand. This was not revolution. It was evolution. As befitted a distinguished and experienced judge whose life had been dedicated to the rule of law, it did not turn established rules on their face. But it provided a new and creative way by which the growing body of international human rights jurisprudence could be harmonised with the domestic law of the judge's own jurisdiction.

When I returned from Bangalore to Australia, and began to apply the *Bangalore Principles,* it caused not a few raised eyebrows

(and some elegantly expressed denunciation of legal heresy)[12]. But it is interesting as I look back over the decade since Bangalore in 1988 to see the growing impact of the *Bangalore Principles* not only in Australia but in other lands which share the common law tradition. This is, as Lord Cooke of Thorndon has suggested, "a law that is undergoing evolution"[13]. In this evolution, we are all the disciples of Justice Bhagwati. His impact on the legal system of India was great and is enduring. But it was not enough. His insights had to be shared with a wider world, including with judicial and legal colleagues in Australia.

ENCOURAGEMENT

I therefore welcome the publication of the collected writings and speeches of Justice Bhagwati. Some great judges, who influence the development of law in their jurisdiction, have an even greater impact by their extra-curial writing. Justice Benjamin Cardozo, long-time judge, and Chief Justice, of the New York Court

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12 For an example see *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 (CA) per Powell JA, 290-293.

13 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266. For a recent application of the principles in the context of constitutional interpretation in Australia, see *Newcrest Mining v The Commonwealth* (1997) 71 ALJR 1346 (HC) at 1424; cf *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 (HC) at 765-766.

of Appeals, probably had greater impact in his later years, and in the years since his death, by virtue of his extra-judicial writing. In 1920, the Yale Law School invited him to deliver the Storr Lectures. These were published in his highly acclaimed volume *The Nature of the Judicial Process.* Subsequently he published two additional lectures, *The Growth of the Law* (1924) and *The Paradoxes of Legal Science* (1928). They won him international acclaim.

Justice Bhagwati already has international acclaim. To rise to become the head of the legal system of the most populous nation which lives by the rule of law and under constitutional authority, is itself a glittering achievement. But since his retirement from active judicial life, Justice Bhagwati has devoted his boundless energy to the work of the United Nations and the international human rights bodies which stimulate, criticise and inspire the champions of human rights around the world. Most notably, he has served as a member (and lately Vice-Chairman) of the United Nations Human Rights Committee, a position to which he was recently re-elected. He has been Chairman of the Board of the Centre for the Independence of Judges and Lawyers. This body, a creation of the International Commission of Jurists, brought us into even closer association during the time that he was Chairman and I was President of the Commission. He has limitless enthusiasm for good and righteous causes. He continues to instruct young lawyers and young judges in the ways by which they can convert the noble sentiments of human rights into their daily professional work. He is, in fact, an inspiration. I do not doubt that his writings and speeches will bring the subtle

and idealistic working of his mind to the attention of a still larger audience, so that his influence becomes even more widespread and enduring. It is a matter of pride for me, as an Australian judge and a judicial brother, to be associated with this most timely work. I pay tribute to the Honourable P N Bhagwati, my teacher.