

**BENCH & BAR OF THE BOMBAY HIGH COURT**

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**H M SEERVAI CENTENARY LECTURE**

**H M SEERVAI'S CENTENARY - HIS LIFE, BOOK & LEGACY**

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High Court of Australia

**LIFE**

Hormasji Maneckji Seervai was born in Bombay on 5 December 1906. At the same time, on the other side of the subcontinent, Rabindranath Tagore was reaching the zenith of his creative powers. In poems that he himself translated into the language of the latest class of foreigners who had temporarily conquered India, Tagore expressed the burden of those who try to sing after the manner of a great master<sup>1</sup>:

"The light of thy music illumines the world.  
The life breath of thy music runs from sky to sky.

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\* Justice of the High Court of Australia. The author acknowledges the assistance of Mr Adam Sharpe, legal research officer in the Library of the High Court of Australia, in assembling materials upon which this lecture is based.

<sup>1</sup> Rabindranath Tagore, *Gitanjali* (Macmillan, 2000) (1st ed, 1913), Poem 3.

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The holy stream of thy music breaks through all stony obstacles  
and rushes on.

My heart longs to join in thy song,  
but vainly struggles for a voice.  
I would speak, but speech breaks not into song,  
And I cry out baffled.

Ah, thou hast made my heart captive  
in the endless meshes of thy music, my master!"

What a privilege it is for me, a judge and erstwhile advocate from Australia, to be invited to join in the reflections on the centenary of H M Seervai. There are so many, here in Mumbai, who knew him as a vital, living, restless force. So many who could speak of personal debts; of fond admiration; of brave deeds; of strong opinions, strongly stated. So many who knew and loved him fiercely - and defended him, even when his passion for law and justice sometimes got the better of his tongue and pen. As I pondered on the invitation to speak on this centenary occasion, I wondered if the reason for inviting a foreigner was that the local voices did not trust themselves to speak without tears or to adhere to the song of the master: such was the strength of his personality.

So I come, with a deep affection for India, a great love of this vibrant city, a respect for its Bench and Bar and an admiration for my subject to speak of Seervai, of his life, of his work and of his legacy. Most advocates and judges, however great, walk for but a short hour on the stage of the law. They play their parts. Their voices are raised and the pages of the books are filled with their learning. But then they

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depart. They are remembered by their loved ones and a few friends or grateful litigants. But soon they are forgotten.

Not so with Seervai. He was the advocate's advocate. He lived in tumultuous times for India. He was an example and an inspiration for lawyers in this country, and thus for all of us in the company of the common law scattered to every corner of the globe. He was not without faults, as I shall show - for all of humanity's children are flawed. But he was a mighty advocate and a fine scholar. He was an example of courage at the Bar without which our peculiar system of law and justice does not work. We therefore dignify ourselves by coming together soon after the centenary of his birth, to rekindle the memories of his life and to reflect on the lessons that we who live on must learn from the existence of this creative spirit of our discipline.

By family tradition, the name Seervai derives from Persian words for 'like a lion'. Lion-like he was to become as an advocate - although Fali Nariman in his essay, "Last of the Serjeants" likened him during his seventeen years of service as Advocate-General for the Government of Maharashtra to a "bull-dog" - "guarding [the law] with erudition, fine advocacy and high integrity"<sup>2</sup>. That most faithful of disciples, Tehmtan Andhyarujina, reminds us that the great warrior was once a little boy

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<sup>2</sup> F Nariman in F H Seervai (ed) *Evoking H M Seervai - Jurist and Authority on the Indian Constitution* (Universal, New Delhi, 2005) (hereafter "*Evoking*"), 48 at 50.

growing up in the faith of his Zoroastrian religion not far from the newly arisen Bombay High Court, learning the tenets of "*Humata, hokhta, hvarshata*": Good thoughts, good words and good deeds. His family, middle-class Parsis, saw to his education with meticulous care. Although his father died when he was still a boy, he matriculated from Bhada New High School and entered the famous Elphinstone College in 1922. Four years later he graduated with a First Class degree in Philosophy, a student, as his wife Feroza was later to be, of the illustrious teacher of logic and philosophy, Professor J C P D'Andrade.

He studied law in the Government Law College. In 1932 at the age of 26, he joined the Chambers of Sir Jamshedji Kanga, also to serve as Advocate-General of Bombay.

Although his family had no connections with the law and although he spent many years - amazing to think of it - as a semi-briefless barrister, he never doubted his own capacity or calling<sup>3</sup>. He had an effortless command of the English language and its classics. He was quick, logical and incisive. He hated superficiality. Gossip, which is often the cement that binds together close professions working in fraught circumstances, was not his interest. He lived at home with his widowed mother till he was nearly forty. She inspired him in a respect for the ability and equality of women - a lesson reinforced when he married

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<sup>3</sup> T.R. Andhyarujinain in *Evoking*, 20 at 23.

Feroza, his loving wife, mother to their three children, Meher, Shirin and Navroz. They became helpers in his scholarly output and fierce guardians of his memory and legacy.

As Seervai's legal practice grew, he was conspicuous in the Bar library. His pronouncements on cases and on the issues of the day were confident and ever emphatic. His self-assurance and conviction in his own judgment were "remarkable". In short, he had courage "like a lion", and the fearlessness that one would hope for in a leading surgeon, a brave soldier or a senior advocate. Reportedly, he was not at first interested in constitutional law. Doubtless in his early years, in the turmoil of the slow death in India of the British *Raj*, that field of law must have seemed unstable, unsure, unpromising to a lawyer who liked to see things clearly. But it was his fate to live through, and to chronicle, the extraordinary events that, sixty years ago this year, brought freedom and independence to the teeming millions of this subcontinent. Moreover, by the hand of fate, he was to play an important part in the elucidation of the Constitution which the newly found nation of India gave to itself for its governance. In court, and in the pages of his writings, he was to help clarify the meaning of the Constitution; to contribute to what he saw as its orthodox interpretation; and to extirpate any deviation from what he regarded as true doctrine.

After years in private practice, Seervai, briefless no more, was by the early 1950s, much in demand for briefs junior to the then Advocate-General for the Government of Bombay. His moment was soon to arrive

when it fell to him to defend the *Bombay Prohibition Act*. This was a cause he could embrace with neutrality. Although he was not a moralist or a fanatical believer in prohibition, his only encounter with alcohol was for rare medicinal purposes. His closing speech in defence of the law earned the admiration of the government.

His first chance in the Supreme Court of India arose in a defence of the Government of Bombay's decision to ban prize competitions, in the nature of lotteries<sup>4</sup>. Seervai's argument was rewarded with spectacular success. The judgments and orders of the Bombay courts were unanimously set aside with costs. A year later, Seervai began his service of seventeen years as Advocate-General. In such a post, coming from such a Bar, he was assured of involvement in many of the leading trials and appeals of the State and the nation.

Seervai was to prove fearless and independent in the advice he tendered, relatively indifferent to the income and opportunities which the post offered and detached from the politicians and the government of the day, carrying on in this country the traditional role of the best of the counsellors of the Crown - fearless, honest and politically neutral. This is a great tradition. As you in India, and we in Australia, get further away from that tradition in time and memory, it is essential that we keep it

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<sup>4</sup> *Ibid*, at 24 referring to *R M D Charmorbaugwala v State of Bombay* (1957) SCR 930; AIR 1957 SC 699.

alive, for it is most beneficial to effective and honest government, conforming to law.

The memories of Homi Seervai, recorded by members of his family in the two books that, since his death, have been published in his honour<sup>5</sup> are moving and tender, as one would expect of family recollections of a loving husband, father and grandfather. They tell of his brilliant recall of the poets and historians from Thucydides right up to those great Imperialists, Winston Churchill and Rudyard Kipling. His laughter, kindness, family-centred life and comparative indifference to worldly things, like fine clothes and food, strike a chord with all of us who have known the upper echelon of A-type personalities - obsessive, fastidious, punctilious yet often with warm personalities struggling occasionally to shine upon the world. Those who dwell in the busy professions of life know and respect such personalities with their little obsessions (Homi, for example, would tell cricket scores from ages past out of his memory<sup>6</sup>). His letters of gentle love and postcards and notes, recorded in the texts, remind us that behind the public man was a living, breathing human being, with a private zone that was closed and guarded and into which few could enter. Every human being of great achievements needs such a zone. Blessed is the achiever who can come home to candid criticism and loving support when things get rocky.

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<sup>5</sup> F H Seervai (ed) *Evoking H M Seervai* (above) (2005); V Iyer (ed), *Constitutional Perspectives - Essays in Honour and Memory of H M Seervai*, Universal (2001).

<sup>6</sup> F H Seervai in *Evoking*, 95 at 101.

Yet it is in the essays from prominent, and no so famous, lawyers, that we get clues about Seervai the public man and the motive forces that lay behind his public life. We also get insights into what Seervai's contemporaries at the Bench and Bar saw as his central characteristics, worthy of passing on to new generations, so that they might emulate the best of the traditions of the past, cutting away those that are no longer relevant for the present and the future.

In the early 1950s, Seervai was faced with a move to abolish the dual system of solicitor and counsel that had been inherited from England - a system that survives in many countries to this day but was then under threat in Bombay. According to Anil Divan<sup>7</sup>:

"Seervai and K T Desai at great personal cost in terms of time, energy and work, went from table to table in the Bar Library persuading young counsel like me that the dual system had great virtues. They also worked out a scheme by which advocates in good practice would voluntarily designate themselves as seniors and would desist from accepting a brief unless briefed with junior counsel. ... As a result the resolution moved to recommend abolition of the dual system in the Bar Association was defeated and the dual system remained current for many years. Many of us were beneficiaries of that continuation. One does not know who would have made good or even continued at the Bar if the dual system had been abolished".

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<sup>7</sup> A B Divan, "H M Seervai: Random Memories and Recollections" in *Evoking*, 53 at 58.

In Australia, and doubtless elsewhere, the strictness of the dual system has changed. But, from my own life as a young solicitor, I know that in most cases the gruelling work of counsel can only be done to best advantage by someone who is freed from the time consuming tasks of issuing subpoenas, tracking down witnesses, chasing for costs and all the other essential responsibilities from which leading advocates need to be protected so they can concentrate on what they do best.

Justice R S Pathak saw in Seervai a man "extremely jealous of protecting [the courts'] public reputation, anxious to see that the stream of justice flowed unpolluted, and ensured that no deviation which came to his knowledge, remained uncorrected"<sup>8</sup>. Justice Sujata Manohar, one of the first woman Justices of the Supreme Court of India, told of his resignation as Advocate-General of Maharashtra in 1974 when the Law Minister appointed two advocates whom Seervai described as "party lawyers" to advise him - a move interpreted as undermining his independent authority<sup>9</sup>. His true friend, Tehmtan Andhyarujiana, in his youth a Devil and junior to the great man, describes his "commitment in life" and "total sincerity, honesty and devotion" which was his "great strength as a lawyer"<sup>10</sup>. Mixed with his ebullience and confidence, these were a concoction of personality that were to be a potent mixture, spiced

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<sup>8</sup> Justice R S Pathak in *Evoking*, 14 at 15.

<sup>9</sup> Justice S Manohar in *Evoking*, 17 at 19.

<sup>10</sup> T R Andhyarujina, in *Evoking*, 20 at 21.

with courage<sup>11</sup>. Atul Setalvad concluded that, whilst there were others who as advocates were superior, "what made Seervai unique was his profound knowledge of the law ... [for] he was an expert in almost all branches of civil law"<sup>12</sup>.

Soli Sorabjee, another doyen of this Bar, recalls how kind Seervai was to juniors who opposed him in Court and how he gave them generous guidance and encouragement<sup>13</sup>. But he acknowledges that "Seervai had strong likes and dislikes"<sup>14</sup>. Occasionally, one suspects, he allowed his commitment to his case to colour his view of the judges who reached a different conclusion<sup>15</sup>. Fali Nariman, another supreme example of this Bar, confessed to having been the beneficiary of Seervai's criticism of Supreme Court judges when once Seervai devoted many closely printed pages of his third edition to a biting critique of the *Escorts Case* that Fali Nariman had lost in the Supreme Court. His castigation was a kind of vindication for the smarting advocate - confirming once again that there is an appellate court even over the House of Lords called the *Law Quarterly Review*.

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<sup>11</sup> *Ibid*, 29.

<sup>12</sup> A M Setalvad, "H M Seervai" in *Evoking* 41 at 43.

<sup>13</sup> S J Sorabjee, "Homi Seervai - A Personal Tribute" in *Evoking*, 45 at 45.

<sup>14</sup> *Ibid*, 46.

<sup>15</sup> *Ibid*, 46. His views on Justice P N Bhagwati were a case in point.

In a wise and measured comment, Fali Nariman remarks<sup>16</sup>:

"Do harsh words about judges and their judgments *have* to be used? Well, not always - perhaps only occasionally: because of what that great economist Lord Keynes used to say: 'Words have sometimes to be harsh since they represent an assault on the thoughts of the unthinking'. It shakes people up - and it is good for the soul to shake up some people some of the time!".

Even Seervai himself admitted that he sometimes erred and exceeded prudence in his criticisms. But he would not compromise on what he saw as truth or on courage. And with such a man, even allowing for the hurts, you had to take the bitter with the sweet.

Iqbal Chagla acknowledged that he "set for himself the highest standards of moral integrity and in that he was totally inflexible and uncompromising, at times unreally so"<sup>17</sup>. It made him *sui generis*, unique, but sometimes hard to stand with.

Ashok Desai, former Solicitor-General of India, observed how sometimes Seervai made submissions "which were too detailed for the case"<sup>18</sup>. But that was just the high standard he always set for his advocacy. He was single-minded and blessed with unwavering

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<sup>16</sup> F S Nariman, "Last of the Serjeants" in *Evoking*, 48 at 52.

<sup>17</sup> I M Chagla, "Full Court Reference" (Address as President of the Bombay Bar Association) in *Evoking*, 7 at 8.

<sup>18</sup> A H Desai, "Some Reminiscences" in *Evoking*, 64 at 66.

concentration and the sharpest of focus. He was also prudent and modest (even parsimonious) in the spending of public moneys.

Whereas the verbal flights of most advocates disappear into the ether of the courtroom, unless they find their mark in the mind and pen of an attentive judge, it was Seervai's fateful decision to write his monumental text *Constitutional Law of India* that put him on the map so far as judges and lawyers of India and of other lands are concerned. This work has passed through four editions. The last, a *Silver Jubilee Edition* in three mighty volumes was completed just hours before Seervai died in Bombay on 26 January 1996. It was as if the analysis and dedication and passion of the book had kept him alive, with the loyal support of his wife Feroza and the matchless encouragement of his publishers, until the last word on the last page of the final volume was penned.

Seervai wrote other texts, including his *Partition of India: Legend and Reality* and *The Position of the Judiciary Under the Constitution of India*. But it is his text on constitutional law that is his masterpiece. For it, the British Academy in 1981 honoured him as a Fellow. And Lord Mackay of Clashfern rightly observed<sup>19</sup>: "It is 'a permanent memorial to his massive erudition'. It is not a 'mere commentary of the usual kind'".

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<sup>19</sup> Lord Mackay, "Memories of H M Seervai" in *Evoking*, 16 at 17.

The book is a "searching, appreciative but at times scathing, analysis of what went into the judicial dicta" about the precious constitutional text that Seervai regarded as being in his special trust. As the author of the best known, most widely used and prize-winning book on the Constitution of his country, Seervai felt it to be his duty to speak out, with sharpness and candour, even personal criticism, of those judges who strayed from what he saw as the straight and narrow path of constitutional doctrine.

It is a blessing of my life that a full set of these precious volumes was sent to me soon after my appointment to the High Court of Australia. There are differences, and similarities, between the Constitutions of Australia and India. I have described them before<sup>20</sup>. This is not the occasion to do so again. The commonalities of the legal tradition, the selected similarities of the constitutional text and the mutual respect that existed between Seervai and the first chronicler of the Australian Constitution, Dr Anstey Wynes<sup>21</sup>, often make it useful for me to plunge into Seervai's book. In several of my judicial reasons I have

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<sup>20</sup> M D Kirby, "Constitutional Law: Indian and Australian Analogues" in V Iyer (ed) *Essays in Honour and Memory of H M Seervai* (2001), 166; M D Kirby, "To Midday's Children in India - The Bright Tomorrow" in S J Sorabjee (ed) *Law and Justice Vol 4* (1997), Supreme Court Golden Jubilee Issue 79; M D Kirby, "A Neglected Transnational Legal Relationship: A Plan of Action for Australia" (1997) *Australian International Law Journal* 17.

<sup>21</sup> W A Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed, 1976).

referred to it as the source and inspiration for my ideas<sup>22</sup>. And I am not alone in my Court<sup>23</sup>. As it is said so often, the book is not an ordinary text on constitutional law. Here one will not find merely the Constitution's words, a cold analysis of the judicial elaboration and presentation of the winding course of authority as if it were the inevitable, consistent out-growth of the words. Instead, leaping out from every page is an opinionative, engaging, controversial, often upsetting collection of opinions, praise and castigation of a type that makes Seervai's book wholly special.

### BOOK

Seervai explains in the Preface to the first edition, how the writing of the book began with a link to Australia. In words which he put on paper in the Preface to the first edition in February 1967, he confessed<sup>24</sup>:

"In the manner of speaking, this book has got itself written. It all began fifteen years ago when I read with admiration

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<sup>22</sup> *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1996) 190 CLR 513 at 659 (fn 510); *Pearce v The Queen* (1998) 194 CLR 610 at 644 [106] (fn 173); *Egan v Willis* (1998) 195 CLR 424 at 493 [133] (fn 355).

<sup>23</sup> Thus Murphy J quoted from it in *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 165.

<sup>24</sup> Preface to the First Edition, republished in H M Seervai, *Constitutional Law of India*, xxiii (hereafter "Seervai, *Constitutional Law*").

and delight Dr Wynes's critical commentary on the Australian Constitution. As I laid down his book I could not help expressing to myself a wish that someone would try to do for the Constitution of India what Dr Wynes had done so well for the Constitution of Australia, and I believed then that one at least of the eminent lawyers who had helped to fashion our Constitution would undertake the task".

Listening to the powerful dissent of Justice Kapur in the *Nanavati Case*<sup>25</sup> in September 1960, convinced Seervai that the time had come to embark on the project himself. The first edition engaged him over six years and every day of the remainder of his life was devoted to the task. We, the lawyers of India, Australia and all the lands of the common law, are the beneficiaries.

The size of the work, and the intensity of the treatment of the subject, really speak for themselves. Who else, well into his eighties, would have devoted such loving care to the decisions of judges and to fitting those decisions, as they tumbled out of the courts, into the mosaic of constitutional doctrine? Who else at such an age could have produced a three volume work running to more than 3,250 pages? Little wonder that successive volumes of his great text were honoured in India and far away as mighty examples of scholarship and learning that require a special kind of brain to comprehend, digest and put on paper.

Professor Sir David Williams, later Vice-Chancellor of Cambridge University, wrote of the third edition that it was a "massive undertaking",

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<sup>25</sup> (1961) 1 SCR 497.

demonstrating care and detail which the subject matter deserved. The trenchant criticisms are not typical of British law journals, in their commentary on judges. Perhaps this is because the British still muddle along without a comprehensive written Constitution and look with wonderment at countries of the new world, like yours and mine, that have enshrined great political questions in a legal text, the enforcement of which is entrusted to advocates turned judges in deciding constitutional cases. Professor Williams explains Seervai's trenchant criticisms as the inevitable product of his desire to delve deeply into constitutional questions and to wrestle with the constitutional quandaries of a great democratic country. And yet he comes out at the other end usually with optimism, tinged with reality<sup>26</sup>.

There are many excellent reviews of Seervai's *Constitutional Law of India* in its successive editions, some of them captured on the fly-leaf in the distinctive, vivid, familiar colours of navy blue, white and green<sup>27</sup>. The British, who must now witness their judges performing openly the work of human rights law in the wake of the *Human Rights Act* 1998 (UK), may gradually embrace a more robust and candid assessment of judicial labour. But for those of us who have lived with written national constitutions, as in the United States, Canada, Australia and South

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<sup>26</sup> Sir David Williams's review appears in [1985] *Cambridge Law Journal* 149.

<sup>27</sup> See eg Wilson [1967] *Cambridge Law Journal* 258; Gledhill (1968) 84 *Law Quarterly Review* 279.

Africa, the sharp-tongued critic is a feature of legal life that we know is designed to dispel the illusions of grandeur and the delusions of infallibility that the Bench can fall victim to in our tradition - often encouraged by the leaders of the Bar, who may see themselves as the Bench-in-waiting. Seervai would have none of this. Plain-speaking was his expertise.

Seervai reportedly rejected judicial preferment, both in the famous Bombay High Court and even (so it is said) in the Supreme Court of India. Reasons are suggested: his dislike of travel, his love of his family, his preference for this metropolis. But if it is true that he rejected the Bench, perhaps the reason lay in his growing realisation of the fallibility of all judges, even those whom he liked, admired and loved. Perhaps, doubting that he could reach his own highest standards, he preferred to exercise his influence on doctrine from the pages of his text. Such influence, in all probability, exceeded that of most judges, including on the Supreme Court. Advocate and judge, scholar and student alike leaped at a new edition to see what the author had made of the controversial decisions of the past decade. In a sense, the book became the last word on many topics

John Keats, a poet whom Seervai loved, drew inspiration in first looking into Chapman's *Homer*. So what does one see today, in the twenty-first century, on looking into Seervai's *Constitutional Law*?

First, there is the uniquely opinionative character of this text. This is deliberate and not accidental. Seervai claims a desire to be constructive whilst taking care to "separate the statement of the law and my submissions on it"<sup>28</sup>. He accepts that sometimes his criticisms "may be mistaken". But he is unrepentant for<sup>29</sup>:

"The cause I serve is that of a correct and coherent interpretation of our Constitution. If any of my criticisms are found to be correct, the cause is served; and if any are found to be incorrect the very process of finding out my mistakes may lead to the discovery of the right reasons, or better reasons, than I have been able to give, and the cause is served just as well".

Of course, today there would be many who admit to a doubt that *any* written text yields but a single interpretation. It is of the nature of words, and particularly words in the English language with its dual linguistic streams, that they are often ambiguous<sup>30</sup>. Values will help the reader to reach the construction that seems apt to the text and the context. Perhaps we are more aware of these features of interpretation today than we were when Seervai learned his law and wrote the successive editions of his great book. Perhaps the judges whom he criticised were sometimes those who looked behind the words and, disdaining original intent, sought to give them meaning so as to fulfil the

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<sup>28</sup> Seervai, *Constitutional Law*, Preface to the First Edition, p xxiv.

<sup>29</sup> *Ibid*, Preface to the First Edition, p xxiv.

<sup>30</sup> *News Limited v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42] per McHugh J.

functional purposes of such a precious document as a nation's Constitution: intended to operate indefinitely for the good governance of a great country<sup>31</sup>.

Secondly, Seervai's prose is not only opinionative. Often, it is sharp to the point of administering a deliberate personal sting. Rarely does one see, in other books on constitutional law, commentaries such as those of Seervai. Thus, what Justice Khanna might call an "odd" result, Seervai describes as "startling". The exclamation mark and the denunciation of decisions as "a travesty of justice" single his text out amongst the respected books of law in our shared language and tradition. Indeed, it is a source of regret that Seervai did not live to witness the recent language written by Justice Scalia in the Supreme Court of the United States which, when speaking of his colleagues, sometimes reminds me of Seervai's prose, although at its most understated<sup>32</sup>.

Thirdly, there are many instances where Seervai tackles controversy that others might have been inclined to allow to pass. Thus, in the preface to his fourth edition, there is a prolonged coda on the attempted impeachment of Justice V Ramaswami, a judge of the Supreme Court<sup>33</sup>. For four closely printed pages, the author cannot let it

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<sup>31</sup> cf *Lawrence v Texas* 539 US 558 at 578-579 (2003).

<sup>32</sup> eg *Lawrence v Texas* 539 US 558 at 598 (2003).

<sup>33</sup> Seervai, *Constitutional Law*, Preface to the Fourth Edition, p xvii.

rest. The affront to his sensibilities is plain. Yet occasionally a reader, trained in our tradition, thirsts for the expression of the contrary view. Ever the advocate, Seervai states his own view, bluntly.

Fourthly, it is clear that, to the end, Seervai was greatly influenced by traditions of the law in the India in which he grew up. These left him with a profound respect for English law, English literature, English history and the high professionalism of the British courts. To the very end, he was closely watching the *Spycatcher* litigation in the United Kingdom<sup>34</sup> and the leading cases of the House of Lords, such as *Pepper v Hart*<sup>35</sup>. He respected the stability of the Privy Council as a judicial tribunal and what he saw as "the predictability of its decisions"<sup>36</sup>.

As growing decades separate Indian and Australian lawyers from the formal links to that distinguished imperial tribunal, it is as well to be reminded of its strengths, so long as we do not forget its inevitable weaknesses. Seervai condemns the "desire for justice in individual cases which converts the judicial process into a gamble"<sup>37</sup>. He thirsts for unbending adherence to the law, though the heavens may fall. Yet allowance must always be made for the oath that judges take to do right

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<sup>34</sup> *Ibid*, Preface to the Fourth Edition, p xxi.

<sup>35</sup> [1993] AC 593; see Seervai, *Constitutional Law of*, Vol 2, liv.

<sup>36</sup> Seervai, *Constitutional Law*, Preface to the First Edition, p xxv.

<sup>37</sup> Preface to the First Edition, p xxvi.

to all manner of people. The banner of our tradition is justice under law. We should never forget the "justice" part of that equation. Clearly, Seervai was most sensitive to the justice of legal expectations. He was affronted whenever, in controversial cases, the court strayed from what he saw as their duty to the letter and spirit of the law. This led to his spirited attacks on the Supreme Court for its rulings in, amongst other cases, *R C Cooper v Union of India (the Bank Nationalisation Case)*<sup>38</sup> and *Golak Nath v State of Punjab*<sup>39</sup>. And even those who disagreed with his "truly remarkable capacity for incisive analysis" acknowledged the force and persuasiveness of his positions<sup>40</sup>.

Seervai's work is sprinkled with references to the great English lawyers of his age. He singles out his hero Lord Reid and that other great judicial craftsman, Lord Denning. Sir William Wade and the other respected writers on public law are repeatedly cited. He was not a narrow nationalist in legal doctrine. In constitutional law, especially, it is important for all of us to keep in tune with the great movements that are happening in other jurisdictions similar to our own.

Fifthly, Seervai repeatedly demonstrated his love of, and respect for, history as the necessary setting for constitutional elaboration. The

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<sup>38</sup> (1970) 3 SCR 530.

<sup>39</sup> (1967) 2 SCR 762.

<sup>40</sup> V Iyer, "My Recollections of Homi Seervai" in *Evoking*, 68 at 68.

fourth edition of his text contains a most fascinating review, extending over 170 pages, of the history that lay behind the mighty struggle for national independence in India. Of the fitful steps towards devolution of British power to a united India. Of the fateful manoeuvres that led to the partition of India. Of the blood spilt and the energy devoted to the creation of the new nation's Constitution, written in sacrifice but with optimism for the future.

It is clear in the preface to the First Edition, and made clearer in his later writings, that Seervai saw the division of India as an unnecessary product of uncompromising egos amongst all the participating parties. The one participant who emerges unscathed from his history is Lord Wavell, elevated in wartime from Commander-in-Chief to Viceroy. Strangely, one learns from Seervai's legal text, why he warmed to this "rugged, straight-forward soldier void of verbiage and direct both in approach and statement"<sup>41</sup>. Here was the kind of man, rather like himself: "Not devious like a politician but [who] came straight to the point". Not everyone has the stomach for such directness of approach. To many both of the Indian and English cultural traditions, it is a confronting one. It sometimes leaves little space for accommodation, compromise and adjustment for conflicting viewpoints. It is like a purgative in the body politic. It is surely good for overall health. But sometimes it can be hard when it is administered.

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<sup>41</sup> Azad, cited in Seervai, *Constitutional Law of India*, (4th Ed), 115.

Sixthly, and this is clear from the family reminiscences, Seervai reflects a narrower view than would often now be held concerning the importation of political, economic and social concepts into the task of constitutional interpretation. In the preface to his first edition, he cited at length Chief Justice Latham of Australia in the *Communist Party Case* as saying<sup>42</sup>:

"It is sometimes said that legal questions before the High Court should be determined upon sociological grounds - political, economic or social. I can understand Courts being directed (as in Russia and in Germany in recent years) to determine questions in accordance with the interests of a particular political party. There the Court is provided with at least a political standard. But such a proposition as, for example, that the recent *Banking Case*<sup>43</sup> should have been determined upon political grounds and that the Court was wrong in adopting an attitude of detachment from all political considerations appears to me merely to ask the Court to vote again upon an issue upon which Parliament has already voted or could be asked to vote, and to determine whether nationalisation of banks would be a good thing or a bad thing for the community. In my opinion the Court has no concern whatever with any such questions. In the present case the decision of the Court should be the same whether the members of the Court believe in communism or do not believe in communism".

Whilst there is obviously great truth in the need for judicial detachment - and overall it has been a precious hallmark of our shared legal and judicial traditions - the concept of ignoring values, broadly

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<sup>42</sup> (1951) 83 CLR 1 at 148-149.

<sup>43</sup> (1948) 76 CLR 1.

described as "political" or "social" or "economic" is not now one that is universally espoused. A Constitution is a political document. Decisions about it are, in the broad sense, political. Ignoring the way the polity should work under the Constitution, can lead to a rigidity that, fortunately, the majority in the High Court of Australia avoided in the *Communist Party Case*. In that decision, Chief Justice Latham was in sole dissent. All the other participating Justices agreed that the federal legislation in question there, to ban the communist party and to deprive communists of civil liberties, was constitutionally invalid. Justice Dixon extracted from the Constitution an implication, deep and abiding, of adherence to the rule of law, always binding on Parliament and the Executive Government<sup>44</sup>. In fact, in many of his comments on Indian cases, Seervai shows a Dixon-like commitment to limited governmental power rather than Latham-like acceptance of the fiction that triennial visits of citizens to the ballot box justify everything thereafter that a government does within its term of office.

Let us have no more talk in India or Australia of the "sovereignty of Parliament". This is a notion, right enough perhaps in England in the nineteenth century, but totally out of keeping for a government of limited powers which our written constitutions apply in both our countries. For us, sovereignty belongs only to the people. All government is limited and subject to law.

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<sup>44</sup> (1951) 83 CLR 1 at 193.

Seventhly, Seervai recognised the necessary limitations of conventional textbooks and casebooks. He was no mere reporter and did not want to be. He knew that citation of foreign authority had to be discerning because, in his day, access to foreign casebooks and texts was strictly limited in India, like everywhere else<sup>45</sup>. Now, through the Internet, we can search and Google and discover great riches in the leading courts of our tradition everywhere. Seervai's fascination with foreign analogues was right, but ahead of its time. Technology now opens up the learning of the Supreme and High Courts of India to judges and advocates everywhere. And with that learning comes Seervai's analysis, criticisms and opinions.

Eighthly, throughout his analysis, one can see Seervai's deep commitment to the secular principle that is stated in the added language of the 42nd Amendment to the Indian Constitution in 1976<sup>46</sup>. It is secularism that leads Seervai to criticise all the leaders of the Independence movement - not just Jinnah (also a leading Bombay barrister) but Gandhi for what he describes as the "crime to mix up religion and politics". In the expiation of that crime, Seervai declares "there is a price to pay, and in India we paid it in full with the partition of

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<sup>45</sup> Preface to the First Edition republished in Fourth Edition, Vol 1, p xxiii.

<sup>46</sup> The words "Sovereign, Socialist, Secular, Democratic Republic" were inserted by the 42nd Amendment to the Constitution (1976), s 2.

India"<sup>47</sup>. He is sharp and unforgiving in his judgment on this point. His introductory historical essay, and the Appendix to volume 1 of the fourth edition stand as monuments to what might have been, if only the times had been a little different and the players had exhibited greater detachment and willingness to compromise.

Ninthly, despite the sharp words, sometimes directed at greatly respected judges and even friends<sup>48</sup>, the predominant mood of Seervai's book is one of optimism<sup>49</sup>. He was, after all, operating in a free country, sustained by the very Constitution over which differences could be held and strongly expressed. He was not liable to be dragged away at midnight to answer to a government or religious or party official angry with his criticism. Nor was there any real chance that he would be punished for contempt of court. Nor was it ever likely that he would be arrested by opinionated military or security police.

Seervai was foremost in his condemnation of the weakness of the courts in confronting Mrs Gandhi's Emergency. He was the first to recognise the critical importance of responding to overweening

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<sup>47</sup> Seervai, *Constitutional Law*, Fourth Ed, Vol 1, 951.

<sup>48</sup> His comment in Vol 1, 610 (par 9.2.79) on Justice Krishna Iyer's reasons in *Akhil Bharatiya Soshit Karmachari Sangh v Union of India* (1981) 2 SCR 185 are an example. See also in Vol 1, p 2240 his comment on Justice P N Bhagwati; cf S J Sorabjee in *Evoking*, 45 at 46.

<sup>49</sup> As Sir David Williams concluded [1985] *Cambridge Law Journal*, 149.

governmental power<sup>50</sup>. In doing so, he drew, as usual, on the earlier failings of the House of Lords in England in the wartime decision in *Liversidge v Anderson*<sup>51</sup>. In the current age, his exercise of the freedom to criticise serious error bears lessons for us all as anti-terrorism measures sometimes test the constitutional limits.

Tenthly, Seervai was not inflexible, unbending, incapable of changing his mind. Even in fundamental things, Seervai could be shifted, could alter his opinions. Thus, he came around from his earlier strong inclination against the Basic Structure doctrine to see how important the implication would be for the defence of the foundations of government and the protection of the rights of all people in India - a country where it was much easier than in most to change the constitutional text<sup>52</sup>. He thus had strong opinions, strongly expressed. But he was not a lifeless rock. He was, indeed, a sensible, practical, highly experienced lawyer. He could see that, from time to time, doctrine needed to shift with the needs and functions of the Constitution as a living instrument of government.

Never has this idea been better expressed, in my view, than by Justice Kennedy, writing for the majority of the Supreme Court of the

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<sup>50</sup> See Seervai, *Constitutional Law*, Appendix to Vol 2 in Fourth Edition, p 2235.

<sup>51</sup> [1942] AC 206 in *ibid*, 2230.

<sup>52</sup> T R Andhyarujina in *Evoking*, 20 at 27 ff.

United States in *Lawrence v Texas*<sup>53</sup>, when striking down, as unconstitutional, the anti-homosexual criminal provisions of the law of Texas:

"Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty and its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom".

Although Seervai never quite embraced this functional concept of constitutional interpretation, he did acknowledge (as the cases say) that the Constitution of India is to be given a liberal interpretation<sup>54</sup>. He accepted the principle of harmonious construction of the whole text<sup>55</sup>. Times change. Constitutional needs change. Though faithful to his view of basic doctrine, Seervai, ever the lawyer, saw great changes happen in independent India. Like everyone else, his mind was carried along with the largest changes, for every lawyer knows that the Constitution must

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<sup>53</sup> 539 US 558 at 578-579 (2003).

<sup>54</sup> Seervai, *Constitutional Law of India* (Fourth Edition). Vol 3, 2306, 2312, applying observations of the Judicial Committee of the Privy Council in *James v The Commonwealth* [1936] AC 578; cf Gwyer CJ in *Central Provinces Case* [1939] FCR 18 at 37.

<sup>55</sup> Seervai, *Constitutional Law*, Fourth Edition, Vol 3, 2318 applying *Madras v Boddu Paidanna* [1942] FCR 90 at 105 per Gwyer CJ.

endure and serve the peace, order and good government of successive generations of the people.

### LEGACY

Upon his death, it is said, Seervai forbade other authors (even some whom I could name who shared his basic philosophy of law) to update and revise his great text. Yet, a perfunctory glance at the reports of the Supreme Court of India will show, that it continues to be held in the highest esteem and to be cited repeatedly as an authoritative source of legal principle and analysis. Thus in *Chairman, Railway Board v Chandrima Das*<sup>56</sup>, Justice Saghir Ahmad refers to a criticism of the earlier decision in *Kasturi Lal's Case*<sup>57</sup> "by Mr Seervai in his prestigious book". The judge concludes that the "efficacy of this decision as a binding precedent has been eroded".

In *State of Karnataka v State of Andhra Pradesh*<sup>58</sup>, Justice Pattanaik reviews counsel's argument with its reliance on Seervai's book concerning the power of courts to resolve the entire dispute between the parties - a beneficial and necessary power in a land of over-burdened court lists.

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<sup>56</sup> [2000] 1 SCR 480.

<sup>57</sup> [1965] 1 SCR 375; AIR (1965) SC 1039.

<sup>58</sup> [2000] 3 SCR 301 at 389.

In *Pradeep Kumar Biswas v Indian Institute of Chemical Biology*<sup>59</sup>, Justice Ruma Pal quotes Seervai's book at length to teach the lesson that "the governing power, wherever located, must be subjected to fundamental constitutional limitations".

In *Harish Uppal v Union of India*<sup>60</sup>, Justice Variava quotes the words of Mr Seervai, described there as "a distinguished jurist" to support the proposition that the courts will "not tolerate any interference from any body or authority in the daily administration of justice".

In *NTR University of Health Sciences, Vijaywada v G Babu Rajendra Prasad*<sup>61</sup>, Justice S B Sinha cites at length Seervai's "classic treatise" to teach the lesson that "in India there are castes. But castes are anti-national". Moreover, they are alien to the constitutional commitment to fraternity, equality and liberty.

In *State of West Bengal v Kesoram Industries Ltd*<sup>62</sup>, Justice R C Lahoti, giving the reasons of the Supreme Court, quotes at length from Seervai's text and specifically his treatment of the legislative power to

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<sup>59</sup> [2002] 3 SCR 100.

<sup>60</sup> [2002] Supp 5 SCR 186 at 208.

<sup>61</sup> [2003] 2 SCR 781 at 796-797.

<sup>62</sup> [2004] 1 SCR 564 at 642, 657, 689, 664.

tax. The book becomes the touchstone for the opinion of the Court, such is the respect in which it is held.

In *Commissioner of Police v Acharya Jagadishwaranda Avadhuta*<sup>63</sup>, Justice Dr A R Lakshmanan, in the course of his analysis uses one of Seervai's criticisms of earlier decisions of the Supreme Court as *obiter* and contrary to mainstream reasoning.

In *Chain Singh v Mata Vaishno Devi Shrine Board*<sup>64</sup>, Justice B N Srikrishna cites at length from Seervai's treatment of governmental acquisitions and the relevance of the amendment of the Constitution to the change of the pre-existing law.

In *Godfrey Phillips India Ltd v State of Uttar Pradesh*<sup>65</sup>, Justice Ruma Pal cites Seervai as teaching the uniqueness of the Indian Constitution and the care that must be observed in invoking judicial authorities from other federations such as the United States, Canada and Australia. It is an intellectual comment, not a xenophobic one. It is based on textual differences not on any sense of local superiority.

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<sup>63</sup> [2004] 2 SCR 1019 at 1052D.

<sup>64</sup> (2004) 12 SCC 634 at [22].

<sup>65</sup> AIR 2005 SC 1103 at 1115-1116 [40].

In *Yashpal v State of Chattisgarh*<sup>66</sup>, Justice G P Mathur commences his interpretation with a reminder of some basic principles derived from Seervai's book. More recently in *Bal Patil v Union of India*<sup>67</sup>, Justice Dharmadhikari quotes Seervai's book at length to emphasise, in the context of that case, the non-theocratic and secular character of the Union of India and the importance of protecting, within it, Muslims and Christians as "children of its soil".

In *Rameshwar Prasad v Union of India*<sup>68</sup>, decided within the last year, Chief Justice Y K Sabharwal expressed himself in support of Seervai's view on the general legal immunities of a State Governor. In *Ashok Lenka v Rishi Dikshit*<sup>69</sup>, Justice S B Sinha invokes Seervai's text in his consideration of aspects of the law on intoxicating liquor restrictions.

In *State of Rajasthan v Rajasthan Chemist Association*<sup>70</sup>, Justice Arijit Pasayat resolves the issue of tax law before him by referring to a principle "succinctly stated" in Seervai's book. In *Surendra Prasad*

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<sup>66</sup> AIR 2005 SC 2026 at 2035 [11].

<sup>67</sup> AIR 2005 SC 3172 at 3177 [22].

<sup>68</sup> AIR 2006 SC 980 at 1035-1036 [168].

<sup>69</sup> AIR 2006 SC 2382 at 2390 [26].

<sup>70</sup> 2006(7) SCALE 330 at 3314 [21].

*Tewari v Uttar Pradesh Rajya Krishi Utpadan Mandi Parishad*<sup>71</sup>, the Justices constituting the Supreme Court Bench invoke Seervai's "in his celebrated book" to emphasise the importance of the principle of recruitment by open competition which, "was first applied in India and then applied in England".

In *Nagaraj v Union of India*<sup>72</sup>, Justice S H Kapadia, resolves the issue under Article 14 of the Constitution then before the Court by reference to Seervai's instruction<sup>73</sup> that the equality principle, enshrined in that constitutional provision, is not violated by mere conferment of a discretionary power. It is the arbitrary exercise of such a power that may attract constitutional intervention.

I have cited these cases at some length in order to demonstrate what is, in any case, abundantly clear. Seervai's text is still a living document. It continues to be in daily use in courtrooms throughout India and beyond. An intellectual monument for a life in the law is not splendid; but enough. Prizes and honours are fine. But the greatest prize for a scholar and practitioner like Seervai, is the continuing use of his work. I have demonstrated that it is a work still frequently cited by

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<sup>71</sup> (Appeal (Civil) 3981 at 2006, G P Mathur & Dalveer Bhandari JJ, 8 September 2006) at [20].

<sup>72</sup> Unreported, Writ Petition (Civil) 61 of 2002, Y K Sabharwal CJ, K G Balakrishnan, S H Kapadia, C K Thakker and P K Balasubramanyan JJ, 19 October 2006 at [70].

<sup>73</sup> Seervai, *Constitutional Law*, Fourth Edition, 546.

the Supreme Court, with obvious respect, celebration and appreciation. Yet for all this it is inevitable that, with the passing of time, new decisions and fresh insights will render the book out of date. So it was in Australia with Dr Wynes's book on the Australian Constitution. So it will be in India, unless Seervai's book is brought up to date.

No author, even one so great as Seervai, has the right to speak beyond the grave and to forbid a new edition to a work so important, basic and instrumental in the life of Indian democracy. If I can use an analogy that would have been understood by Seervai: no Parliament can pass a law that purports forever to bind its successors who, in their wisdom and need, decide to strike out on a different course<sup>74</sup>.

There are many precedents for this course in great legal publications. In 1888, the famed historian of English constitutional law, Professor F W Maitland completed a course of lectures on constitutional history. He asked himself the question "Do I publish it?", to which he gave the public answer "No"<sup>75</sup>. Yet in 1908, in consultation with many great scholars including A V Dicey, Professor H A L Fisher overruled Maitland's wishes, the latter having since died. The text was published

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<sup>74</sup> *British Coal Corporation v The King* [1935] AC 500 at 520 (PC); A V Dicey, *The Law of the Constitution* (10th ed, 1959), 88. Introduction by E C S Wade, xlix.

<sup>75</sup> F W Maitland quoted in "Preface" to F W Maitland *The Constitutional History of England*, Cambridge, 1950, v (First Edition, 1909).

to universal acclaim. It continues to be used and treasured as a work "fully worthy of the author and the subject"<sup>76</sup>. So it must be with Seervai's text.

In Australia, the last edition of Dr Wynes's book was the fifth edition published posthumously. Dr Wynes died in July 1975. Like Seervai, Wynes had completed the revision of all the galley proofs of his text before his death<sup>77</sup>. For thirty years, the book remained a kind of time capsule to the thinking and understanding of the Australian Constitution. But now new authors have been commissioned to bring it up to date. So, in my respectful opinion, it should be with Seervai's text. The greatest monument that he could leave to Seervai's life in the law of India is a living one; one that is constantly renewed.

No doubt some of the opinions, in a newly edited fifth edition, would lack the sparkle, sharpness and combativeness of Seervai's opinions. On the other hand, it should surely not be beyond the wit of the accumulated brilliance of the Bar of the Bombay High Court, to establish a committee of advocates and scholars who are in general harmony with Seervai's dedication to the Constitution of India to share the faithful obligation to update and annotate his text so that it continues to live and breathe. I do hope that, on his centenary, Mrs Seervai and

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<sup>76</sup> H A L Fisher, "Preface" in F W Maitland, *ibid*, v at vii.

<sup>77</sup> W A Wynes, *Legal, Executive and Judicial Powers in Australia* (5th ed, 1976), Publishers note, p vii.

the family will agree to this course, even allowing that it will change somewhat the great tradition of the work.

Let there be no doubt that there are critical issues of constitutional doctrine that need to be considered and updated as we embark on a fresh century of democratic constitutional governance. As I read once again through the precious pages of Seervai's book, I could see how many of the cases and commentaries are relevant to the issues with which we in Australia are struggling at this time.

In recent weeks the High Court of Australia has delivered a constitutional decision which some have described as amongst the three or four most important in the century-long history of the Court: *New South Wales v The Commonwealth of Australia (The Work Choices Case)*<sup>78</sup>. The case concerned the power of the Federal Parliament to enact laws under the grant the power to make laws with trading and financial corporations. The laws in question, on one view, were also laws on industrial disputes - a subject of law-making until now substantially governed only by the qualified conciliation and arbitration power and shared with the States. As I read Seervai's analysis, commanding a liberal construction of legislative heads of federal power, but one that one that gives meaning to every part of the constitutional document, I could see displayed many of the issues which we tackled in

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<sup>78</sup> [2006] HCA 62.

our Court and which are inevitably faced by every federal constitutional court - even one, as in India, with a different division of powers and less rigid federal structure<sup>79</sup>.

Likewise, we have seen in recent months in Australia an important challenge to the growing practice of appointing temporary or acting judges to State courts - it cannot be done in federal courts. This practice, which began as an expedient for *ad hoc* and special needs, has grown quite rapidly into a new institutional arrangement by which a significant cohort of State courts, including the highest State court, hold their appointment from year to year, dependent on confirmation by the Executive Government: *Forge v ASIC*<sup>80</sup>.

The majority of the High Court of Australia saw no offence to the Constitution in these arrangements. But I dissented. Re-reading Seervai's treatment of the dramas that surrounded the Indian experience during the Emergency, and the way acting judges in India were treated at that time, confirmed me in the correctness of my dissent<sup>81</sup>.

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<sup>79</sup> cf I Copland and R Rickard (eds), *Federalism: Comparative Perspectives From India and Australia* (1999). See in particular the articles by H P Lee ("Emergency Powers in Australian and Indian Federalism"); J A Thomson ("Australian and Indian State Constitutional Law: Some Comparative Perspectives"); and G Parthasarathy ("Federalism and Constitutional Processes").

<sup>80</sup> *Forge v Australian Securities and Investments Commission* 2006) 229 ALR 223 at 257ff [127].

<sup>81</sup> Seervai, *Constitutional Law*, Appendix, Vol 2, 2235 ff; Vol 3, 2717-2719, 2761.

A truly independent and uncorrupted judiciary is a most precious governmental resource. Its neutrality and manifest integrity is the coinage in which its reputation is purchased every day. Many lands, perhaps most, have judiciaries that do not enjoy the reputation for independence of the courts of India and Australia. We must guard that independence with the utmost of our power. If ever it is lost, it is difficult, and for a long time impossible, to re-acquire the faith of the people<sup>82</sup>. Seervai knew this instinctively and never failed to make the point. Other branches of government are sometimes jealous of the reputation and respect which the judiciary generally enjoys amongst the people. We cannot always count on the legislature or the Executive to safeguard these virtues. The Bench and Bar themselves must ever be vigilant, as Seervai was, to do so.

In both of our countries, as is inevitable, our courts are increasingly looking to international law, which is the context in which national constitutions are read today. The willingness of the Supreme Court of India to tackle constitutional doctrine with this new insight bears

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<sup>82</sup> See also Preface to the Second Edition, p vii in Vol 1 (4th Ed) and M V Chandramathi, "Overview of Appointment of Judges" in G Manohar Rao, *Constitutional Development Through Judicial Process* (2006) 228.

lessons for us in Australia where unfamiliarity with, and even hostility to, international law are part of the general legal culture<sup>83</sup>.

As a servant of the provisions of the Indian Constitution upholding basic rights, Seervai was not antipathetic to the use of such sources. With such universal ideas in the Indian Constitution, it is inevitable that the writings of other courts and by other scholars on the meaning of common phrases should be, and become, part of the staple content of international law, especially because of the terms of s 51 of the Constitution. The adjustment of our municipal Constitutions to the new reality of international law is a great challenge before all lawyers of the common law world today<sup>84</sup>. This is a further reason for a new edition of Seervai's text so that the new generations of Indian law advocates and students can continue to read its pages with timely instruction and be brought up to date with great new movements that stimulate and influence contemporary public law throughout the world.

I have now performed my task. I am sure that if Seervai were himself here he would strongly disagree with things that I have said. He

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<sup>83</sup> See eg *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589 [62]; cf 617 [152]; and *QAAH v Minister for Immigration and Multicultural and Ethnic Affairs* [2006] HCA 63.

<sup>84</sup> M D Kirby, "International Law - The Impact on National Constitutions" (Grotius Lecture), 21 *American University International Law Review* 327 (2006).

would not hesitate to rise in his place and say so. He would fix me with his eye, and tell me where I got it wrong.

I know this because, as a young lawyer and judge, in 1977, I too travelled to Edinburgh. I sat in that austere Scottish hall at the Commonwealth Law Conference. I saw Seervai mount the platform to remind us all of the importance of the law officers and of their need for independence, integrity and candour as a vital supplement to the essential qualities of the Bench and Bar. I remember then being transfixed with the capacity of this man, speaking without notes, talking from principle, examples, anecdotes and poetry in a way that very few could do. His strong opinions came through. But so also did his strong principles.

I have been brave enough to come to this place from far away to honour one of the foremost servants of the law of India - a fearless upholder of the common law tradition. Whether I would have been so brave if Seervai had been sitting in the front row, I can only leave it to others to imagine.

Brave as a lion was he. And his legacy lives on to strengthen the traditions of one of the great Benches and Bars of the world. From the High Court of Australia and from the Bars of the Commonwealth of Australia I can for once speak with total unanimity, and with no dissent, in honouring Homi Seervai on his centenary. And the greatest way we can honour him is to keep his legacy alive. Resolve here and now to

form a committee of editors for the fifth edition of *Constitutional law of India*. And maintain that work as a living stimulus, provocation, guide and mentor for the ongoing tradition of constitutionalism under the rule of law in India. And for the guidance and benefit of less populous countries which look to India as an example and inspiration for the future of humanity:

"I thought that my voyage had come to its end  
 At the last limit of my power, -  
 That the path before me was closed,  
 That provisions were exhausted  
 And the time come to take shelter  
 In a silent obscurity

But I find that thy will knows no end in me  
 And when old words die out on the tongue,  
 New melodies break forth from the heart;  
 And where the old tracks are lost,  
 New country is revealed with its wonders"<sup>85</sup>.

Tagore is right. In life and in law there is ever a new country with new wonders. We must continue to reveal them. And the greatest way we can remember Seervai's centenary is to make sure that it is remembered a further century hence.

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<sup>85</sup> Rabindranath Tagore, *Gitanjali*, above n 1, Poem 37.

**BENCH & BAR OF THE BOMBAY HIGH COURT**

**MUMBAI, INDIA, 9 JANUARY 2007**

**H M SEERVAI CENTENARY LECTURE**

**H M SEERVAI'S CENTENARY - HIS LIFE, BOOK & LEGACY**

**The Hon Justice Michael Kirby AC CMG**  
High Court of Australia