

3093

FESTSCHRIFT FOR THE LATE  
SOLI SORABJEE AM

SOLI SORABJEE AM – ADMIRATION, WARMTH  
& LOVE: AN AUSTRALIAN TRIBUTE

The Hon. Michael Kirby AC CMG

# FESTSCHRIFT FOR THE LATE SOLI SORABJEE AM

## SOLI SORABJEE AM: ADMIRATION, WARMTH & LOVE – AN AUSTRALIAN TRIBUTE

The Hon. Michael Kirby AC CMG\*

Soli Sorabjee was a great lawyer of India. He also had many friends and admirers in the legal profession of Australia, including me. In 2002, India honoured him with the award of Padma Vibhushan for his earlier defence of freedom of expression and the protection of human rights, including during the Emergency. Yet, his reputation and contributions were by no means confined to India.

In 2006, the Commonwealth of Australia and the Order of Australia conferred on him the rare honour of appointment as an honorary Member of the Order of Australia. This was awarded “for service to Australia/India bilateral legal relations”. He was my friend for more than 30 years. That time spanned the period of my judicial service including as a Justice of the High Court of Australia (1996-2009). Yet, I was only one of many Australian lawyers who enjoyed the stimulus of his company and the joy of his energy and curiosity about the law, both at home and in distant lands, including my own.

---

\* Former Justice of the High Court of Australia (1996-2009) and President of the Court of Appeal of New South Wales (1984-1996); President of the International Commission of Jurists (1995-8) and Co-Chair of the Human Rights Institute of the International Bar Association (2019-21).

I was honoured to contribute to a number of earlier *Festschriften* that celebrated the remarkable life and career of Soli Sorabjee. In 2005, I wrote for the book assembled by Sharma and Ramachandran that rejoiced in his success and fame.<sup>1</sup> On that occasion I saluted the contribution and example of the career of Soli Sorabjee as a “stalwart proponent of human rights in India during the Emergency... When others succumbed, he was valiant for truth and for the rule of law”.<sup>2</sup> In 2010 I contributed to a further book to honour Soli Sorabjee on the topic of “Adaptation and Variation in Appointments to the Highest National Courts”.<sup>3</sup> Later still, in 2012, I offered a felicitation to the Golden Jubilee celebrations of the India International Centre, of which Soli Sorabjee had been the long-time President.<sup>4</sup> On that occasion, I rejoiced in predicting “Growing links: India and Australia”. He agreed with my predictions. On other occasions I honoured the links and similarities between the Constitutions of India and Australia and their shared legal traditions. To those traditions, Soli Sorabjee made a marvellous and enduring contribution.<sup>5</sup>

Now it is my sad duty to pay tribute to Soli Sorabjee following his death in New Delhi on 30 April 2021. It is a tragic fact that he died in consequence of the infection brought to our world by the COVID-19 virus. The pandemic is a terrible calamity for individuals and nations, including India. Hearing that

---

<sup>1</sup> M.D. Kirby, “Soli Sorabjee’s Example & The Struggle against Terrorism” in M. Sharma and Raju Ramachandran, *Constitutionalism, Human Rights and the Rule of Law: Essays in Honour in Soli J. Sorabjee* (Universal, 2005, Delhi).

<sup>2</sup> *Ibid*, 66.

<sup>3</sup> M.D. Kirby, “Adaptation and Variation in Appointments to the Highest National Courts”, *Festschrift for Soli Sorabjee*, 2010.

<sup>4</sup> M.D. Kirby, “Towards Growing Links: India and Australia”, Golden Jubilee Celebrations, 2012, India International Centre, Delhi 2012.

<sup>5</sup> M.D. Kirby, “Indian and Australian Constitutionalism, Judicial Values and our Better Angels” Address to India Law Institute, Delhi, 10 January 2018.

the ghastly statistics ultimately included this fine and gentle man, brings the horror of this catastrophe home to our minds and hearts.

These words of mine join other obituaries expressed by me,<sup>6</sup> and by many loving tributes to his memory recently included in the journal of the Commonwealth Lawyers' Association.<sup>7</sup> It proper and fitting, in a post mortem reflection on the life of Soli Sorabjee to call to mind the astonishing years through which he lived and to which he contributed mightily; the achievement of freedom and independence by his homeland in 1947, completed in 1950; the establishment of the rule of law and constitutionalism in modern India; and his own contributions to that proud personal chronicle of national achievements.

Soli Sorabjee was born in the last decades of the British Empire in India. He was a student and *alumnus* of St Xavier's College, Bombay where (amongst many other lessons) he learnt to play the clarinet. That skill never left him. It led on to his later embrace of modern jazz music and his election as the first President of Jazz India. His life was full of singular achievements of this kind. He spoke in tune and in poetry. He described, in a metaphor, the way that those who live their lives in courts can readily appreciate. Outstanding advocates, he said, must, like a jazz performer, be nimble and partly unconstrained. They must be nimble in presentation; flexible in meeting the unexpected; imaginative and creative in adapting to the moment; but

---

<sup>6</sup> M.D. Kirby, "Obituary, Soli Sorabjee AM (1930-2021)" (2021) 95 *Australian Law Journal*, 736.

<sup>7</sup> *Commonwealth Lawyers' Association and Contributors* "Tributes to Soli Sorabjee: Life President of the Commonwealth Lawyers Association", Tributes 14 July 2021", 2021, 7-10.

nonetheless faithful in adhering to the great themes of the music. These were important lessons of his Jesuit teachers, that impressed themselves at school on the mind of the young Soli Sorabjee. They influenced his approach to his chosen discipline of the law.

He took his law degree at the Government Law College in Bombay. In the High Court of Bombay and in the other fine courts of the Bombay Presidency, he took to the law with relish and professionalism. He brought to its practice the love of words and poetry that were a hallmark of his advocacy. But he also resisted becoming trapped in unnecessary detail. Like the skilled musician that he was, he left his mind flexible and open to new and bolder ideas. He had an astonishing memory with a sure talent for identifying the themes that really mattered. This was why, in later years, younger lawyers, hearing that Soli Sorabjee was to argue a case, packed the courtrooms to watch his performances. He could master the details of a brief in rapid time. His notes for his presentation to the court, in speeches and at conferences were always astonishingly brief. This gave him the great talent that he enjoyed for improvisation and the capacity to respond to any questions or obstacles, that judges, ever so helpful, cast in his direction.

He lived through the glorious days when the Constitution of India was adopted in 1950. With others, it was his privilege to help the famous High Court of Bombay, and later the High Court of Delhi, other Indian courts and ultimately the famous Supreme Court of India, in fashioning the law of the Constitution and of the country, of its States and of the people of India. Soli Sorabjee became the doyen of advocates before the Supreme Court of India before even in the early days when he served as Solicitor-General of India

(1979-80). That was a richly deserved appointment. It followed the courageous role he had played during the Emergency (1975-77). He protested at that time at what he saw as grave departures from the Indian Constitution. He provided legal services, free of charge, to political prisoners. This was a testing time for the judiciary and the legal profession of India. Later he was appointed Attorney-General for India, another recognition richly deserved. He adorned that office with dignity and probity.

He participated as counsel in many leading cases, including the important constitutional case of *Kasavananda Bharati v State of Kerala*.<sup>8</sup> That was the case in which the Supreme Court declared the limitations imposed on the Indian Parliament in its otherwise large freedom to amend the Indian Constitution. “Amend” connoted changing particular provisions of the Constitution; but not in altering the “basic structure”. That must remain intact, immune from change labelled “amendment”. This is a principle that has been followed in overseas countries. Recently it has been discussed in the context of Australia’s own constitutional journey.<sup>9</sup>

His cases before the courts of India left the stamp of Soli Sorabjee’s sharp mind and cogent expression on the subsequent judicial reasons for judgment. But in the politest way, this hero of the law was not uncritical of what the judges of the apex court sometimes did with his arguments. I was reminded of this fact when recently reading the wonderful text by retired

---

<sup>8</sup> (1973) 4 SCC 225.

<sup>9</sup> M.D. Kirby, “250 Years of the Crown in Australia: From James Cook to the Palace Papers (1770-2020)”, (2021) 95 *Australian Law Journal*, 520 at 526. See references to *Islamic Republic of Pakistan v Abdal Wali Khan PLD* 1976 SC 27; cf *Pakistan Lawyers Forum v Federation of Pakistan PLD* 2005 SC 719 and *Trandhyarujina*, *The Kesabadr Bharat case: The Untold Story of Struggle for Supremacy by the Supreme Court and Parliament* (Universal, Delhi, 2011) 72-80, 117.

Justice Rohinton F. Nariman, *Discordant Notes: The Voice of Dissent in the Court of Last Resort*.<sup>10</sup> He was commenting on the occasional difficulty of discerning the binding rule of judicial decisions in a multi-member court. One can only understand and remember Soli Sorabjee's whimsical and enthusiastic approach to law by letting his own voice speak. Addressing himself to the decision of the Supreme Court of India in *S.R. Bommai v Union of India*,<sup>11</sup> he remarked:

“What is the legal effect of these off the cuff observations? Do they constitute the law of the land under Article 141 of the Constitution? How are the High Courts to understand them? Should they be regarded as binding on them? The position is further complicated because the Supreme Court has referred with approval to minority opinion in a judgment because the majority had not expressed any different opinion on the point.

It is respectfully submitted that most of these difficulties would not arise if judges strictly adhered to the wholesome rule evolved by the apex court that in adjudication of constitutional issues it is essential that no opinion should be expressed nor observations made on matters that are not directly in issue. It would also be helpful if judges could clearly express their disagreement with, or reservations about, questions on which opinions have been expressed by other members of the Bench. [However this may be] a daunting task. What has the Supreme Court

---

<sup>10</sup> Penguin Random House, Allen Lane, Delhi, India, 2021.

<sup>11</sup> S.J. Sorabjee, “Decision of the Supreme Court in *S.R. Bommai v Union of India*: A Critique”, (1994) 3 SCC (Jour, 1). Cited R.F. Nariman, above n.10, Vol 1, 6-18.

decided [in the case]? The sad part is that, at the end of the day, it is not possible to deduce with certainty the true *ratio* of the judgment with regard to various other issues which separate and disparate pronouncements on which separate and disparate announcements have been made.”<sup>12</sup>

Soli Sorabjee was not always so polite. Yet he usually voiced constructive criticism with warm words of unfeigned praise, rounded off with adjectives to quieten the ego of even the proudest judge, and with a twinkle in his eyes.<sup>13</sup>

Soli Sorabjee came to Australia as an honoured guest during my time as a Justice of the High Court of Australia (1996-2009). He was invited to a lunch attended by all of the Justices, convened in his honour. He was garlanded and celebrated. In my country he was acknowledged and valued by the legal institutions of Bench and Bar. He recognised, and gently expressed, the conclusion that a shared language, shared legal culture, shared inheritance of words and literature and shared traditions of law, integrity and fundamental rights meant that we could learn from each other. And that we should try harder to do so. And that this was a challenge that all who shared these attributes, in India, in Australia, in the United Kingdom, and everywhere else should accept. Even in those unfortunate lands that have not inherited the great tradition of the common law, the historical integrity and independence of the judges and the love of civility and fundamental freedoms is a cherished heritage and must be kept as such.

---

<sup>12</sup> (1994) 3 SCC (Jour) 1 at 9-10.

<sup>13</sup> S.J. Sorabjee cited in R.F. Nariman, above n.10, Vol 1, 5-7.



On such a man and such a lawyer must be written words of thanks and praise. But for Soli Sorabjee, that is not sufficient. We must add to these emotions, not uncommon for the “Greats” of our profession, a heartfelt expression of admiration, for his human warmth, with, dare I say it, love. It took special times and a special place, India, to shape the man who was Soli Sorabjee. We will probably never see his exact likeness again.