OCCASIONAL PUBLICATION 69

IIC

Enlargement Of Fundamental Rights And Their Protection By The Judiciary

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The Occasional Publication series is published for the India International Centre by Cmde. (Retd.) R. Datta.

Designed and produced by Dee Kay Printers, 5/37A Kirti Nagar Indl. Area, New Delhi-15,

Tel.: 011-41425571, Email: dkprinter@gmail.com

Enlargement Of Fundamental Rights And Their Protection By The Judiciary*

In some quarters, the judiciary is regarded as the weakest branch of the State, because it has neither the power of the sword nor of the purse. If one surveys the judgements of our Supreme Court and their effect and impact on the life of the nation, it is in reality the strongest branch of the State, especially in matters relating to Fundamental Rights which occupy pride of place in Part III of our Constitution.

Let me begin with a few initial remarks. It must be remembered that the chapter on Fundamental Rights in Part III in our Constitution was not incorporated as a popular concession to international sentiment and thinking on human rights in vogue after the conclusion of the Second World War. It was an ancient and persistent demand of our freedom fighters and Founding Fathers that a future Constitution of India should contain a guarantee of Fundamental Rights for the people of India.

The demand was made as far back as 1895 in the Constitution of India Bill, popularly called the Swaraj Bill, which was inspired by Lokmanya Tilak. Thereafter, the Indian National Congress at its special session held in Bombay in 1918 demanded that the new Government of India Act should contain a 'declaration of the Rights of the People of India'. Mrs. Annie Besant's Commonwealth of India Bill finalised by the National Convention of political parties in 1925 reiterated the demand for a specific declaration of Fundamental Rights for every person. Again, in 1928, the Motilal Nehru Committee in its report strongly recommended the adoption of Fundamental Rights as a part of the future

*Transparency India Annual Lecture delivered by Shri Soli J. Sorabjee at the IIC on 9 April 2015.

Constitution of India. It is remarkable that it was stated in this report that 'every citizen shall have the right to a writ of *habeas corpus*. Such right may be suspended only in case of war or rebellion by an Act of the central legislature'. Motilal Nehru would have been shocked that our Supreme Court in its judgement in *ADM Jabalpur* delivered on 28 April 1976, when there was neither war nor rebellion in India, by a majority ruled that Habeas Corpus was virtually not available even in respect of proven mala fide orders of detention. I still find it difficult to believe that our Supreme Court could have delivered such a disastrous judgement. The redeeming feature was the courageous and brilliant dissent of Justice H.R. Khanna whose portrait is placed in Court No. 2 of the Supreme Court. Justice Khanna paid the price for his dissent as he was superseded by the vindictive Indira Gandhi government and was denied the Chief Justiceship of the Supreme Court.

The subject of Fundamental Rights figured prominently in the deliberations of the Sapru Committee (1944–45), which was of the firm opinion that in the peculiar circumstances of India, mark the words, Fundamental Rights were necessary not only as an assurance and guarantee to the minorities, but also for prescribing a standard of conduct for the legislatures, governments and the courts.

On 26 January 1950, India became a Sovereign Democratic Republic as contemplated by the Constitution of India which was adopted by the Constituent Assembly on 26 November 1949. Part III of the Constitution guaranteed a wide array of Fundamental Rights, and most importantly, they are also made judicially enforceable against the State and its instrumentalities. Fundamental Rights would otherwise become mere parchment promises.

Fundamental Rights guaranteed by our Constitution broadly fall into certain categories. Articles 14 to 16 confer the right to equality in its several manifestations and prohibit discrimination on the ground only of religion, race, caste, sex or place of birth. Article 17 abolishes 'untouchability', and its practice in any form is forbidden. Article 19 guarantees basic freedoms such as freedom

of speech and expression; freedom of peaceful assembly; freedom to form associations or unions; freedom to move freely and reside and settle in any part of India; and freedom to practice any profession, or carry on any occupation, trade or business. Articles 19(1) (f) and Article 31, which guaranteed property rights, were deleted by the Constitution (Forty-fourth) Amendment Act 1978 with effect from 20 June 1979. Article 20 provides constitutional guarantees against retrospective criminal laws, double jeopardy and self-incrimination. Article 21 provides that no person shall be deprived of his life or personal liberty, except according to procedure established by law. Articles 23 and 24 provide for guarantees against traffic in human beings and forced labour. Article 25 guarantees freedom of conscience and free profession, practice and propagation of religion, subject to public order, morality and health. Articles 29 and 30 guarantee the rights of minorities to conserve their language, script and culture, and to establish and administer educational institutions of their choice. The guarantees of Articles 14, 21 and 25 are available to every person, citizen and non-citizen alike.

Article 32 guarantees to every person whose Fundamental Rights have been violated to approach the Supreme Court directly for redress without first moving the High Court. A person in Kerala or in West Bengal, whose Fundamental Right is violated, can immediately approach the Supreme Court for redress. This Article was described by Dr. Ambedkar as 'the heart and soul' of the Constitution.

Freedom of the Press has been described as the Ark of the Covenant of Democracy and as one of the most precious freedoms in a democratic state. Every Constitution of the world which has a Bill of Rights proudly proclaims Freedom of the Press. Yet, it is conspicuously absent in Part III of our Constitution which guarantees Fundamental Rights. What could be the explanation? Proceedings of the Constituent Assembly debates reveal that the Founding Fathers considered that Freedom of the Press was contained in the guarantee of freedom of speech and expression and therefore need not be specifically mentioned.

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Our Supreme Court in more than one decision has deduced Freedom of the Press from the guarantee of free speech and expression under Article 19(1) (a) of the Constitution on the premise that it is implicit in the said guarantee. Thus, by creative judicial interpretation, Freedom of the Press has been given the status of a Fundamental Right in our Constitution, and thus there has been enlargement of Fundamental Rights by our judiciary.

After ruling that Freedom of the Press is a Fundamental Right, the Supreme Court has accorded the press effective protection on the sound principle that restrictions on Fundamental Rights should be narrowly construed and should not be enlarged inferentially or by implication. Freedom of Speech and Expression, as also Freedom of the Press, are not absolute Fundamental Rights. They can be reasonably restricted on the grounds specified in Article 19(2), namely, 'the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence'. The head, 'interests of the general public', which is specified in regard to other Fundamental Rights, is not mentioned in Article 19 (2). The Supreme Court in its landmark decision in *Sakal Papers*, delivered in September 1961, ruled that Freedom of the Press cannot be curtailed, like the Freedom to Carry on Trade or Business, in the interest of the general public. The only restrictions which may be imposed are those which clause (2) of Article 19 permits and none other. Furthermore, the restriction imposed must be reasonable, not excessive or disproportionate, and must have a co-relation with the object of the legislation.

In another celebrated decision, *Bennett Coleman & Co.* vs. *Union of India,* the Supreme Court came to the rescue of the press. It held that Freedom of the Press entitles newspapers to decide the volume of circulation, and that freedom

lies both in circulation and in content. The Court further ruled that a newsprint policy under the Import and Export Control Act in the garb of distribution of newsprint cannot control the growth and circulation of newspapers, and a restraint on advertisements would infringe the Freedom of the Press.

The Supreme Court's solicitude for press freedom reached its zenith in its decision in 1986 in *Indian Express Newspapers* vs. *Union of India*. In this case, a steep levy of customs duty on newsprint was challenged. The Court generally does not interfere in matters of taxation regarding rate of tax or duty. However, the Court observed that while newspapers did not enjoy any immunity from payment of taxes and other fiscal burdens, the imposition of a tax such as customs duty on newsprint is an imposition on knowledge. The Court further ruled that a fiscal levy on newsprint would be subject to judicial review, a clear example of judicial soft spot for the press. The Court ruled that in the case of a tax on newsprint, it is sufficient to show a distinct and noticeable burdensomeness clearly attributable to the tax. The Supreme Court in its judgements has placed a generous construction on the ambit of Freedom of the Press and given it a capacious content.

Right to Travel Abroad and Return to one's country is an invaluable human right. Our Constitution does not expressly guarantee this right. The Supreme Court in its landmark judgement in 1967 in *Satwant Singh* vs. *Union of India* spelt out this right from the expression, 'personal liberty', in Article 21 of the Constitution. It accepted the view of the Bombay High Court that the expression, 'personal liberty', occurring in Article 21, included the right to travel abroad and to return to India. This is another instance of enlargement of Fundamental Rights.

Although there is no specific provision in the Constitution prohibiting cruel, inhuman and degrading punishment or treatment as in other Constitutions, the Supreme Court has evolved this right by reference to the Preamble and by its expansive interpretation of Article 21 in conjunction with Article 14.

In another landmark judgement, the Court has ruled that the right to education until the age of 14 is a Fundamental Right emanating from the reservoir of Article 21.

Privacy, which embodies the concept of the right to be left alone, a right most cherished by civilised society, is also not expressly mentioned in Part III of Fundamental Rights. A classic instance of the judicial technique of deducing additional human rights was adopted by the US Supreme Court in *Griswold* vs. *Connecticut*, popularly known as the Contraceptive case. There was a law in the State of Connecticut which made the use of contraceptives a criminal offence. Under the statute, the police could barge into a bedroom to 'search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives'. It was contended that the statute breached the right of Privacy. This argument was countered by pointing out that Privacy is not mentioned in the US Bill of Rights. Nonetheless, Privacy was deduced in that decision by Justice Douglas on the reasoning that 'specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy'. Adopting a similar judicial technique, our Supreme Court has deduced Privacy as a Fundamental Right from Article 21 of the Constitution in its decision in *R. Rajgopal* vs. *State of Tamil Nadu,* which is based on the premise that certain unarticulated rights are implicit in the expressly enumerated guarantees.

Let me mention the question of legal aid. There is no central legislation in India providing for legal aid. The Supreme Court in its judgement in 1978 in the case of *Madhav Hoskot* vs. *State of Maharashtra* held that free legal services to the poor and needy is an essential element of any 'reasonable, fair and just' procedure mentioned in Article 21 and ruled, '(1) where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner's defence, provided the party does not object to that lawyer, (2) the

State which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the court may equitably fix.'

Article 21 seems to be an inexhaustible reservoir from which additional Fundamental Rights are deduced.

Apart from the US Supreme Court, courts in the Republic of Ireland have held that 'the Constitution guarantees various other rights which are not expressly referred to but are obviously a part of the expressly referred to rights.' These additional rights have been termed unspecified or unenumerated rights. The Supreme Court of Canada has also deduced Fundamental Rights which are not expressly mentioned in the Charter of Human Rights.

The aforesaid judicial technique provoked a scathing comment from US Judge Robert H. Bork, the former Solicitor General of the United States and President Reagan's failed nominee for the Supreme Court. Bork thundered:

> The adoption of the Charter, however, emboldened judges and introduced the era of judicial activism. For the first time, the judiciary vigorously used its authority to strike down laws that infringed on what the judges themselves considered fundamental rights not mentioned in the Charter….

What Bork overlooks is that there is nothing novel or shocking about judges creatively adapting the language of the Constitution so as to apply its values to new situations.

In my opinion, it is a fallacy to describe this judicial technique as tantamount to amending the Constitution. In reality, it is a creative interpretation of the Bill of Rights or Fundamental Rights in Part III of our Constitution. It must be remembered that a Bill of Rights is the conscience of the Constitution. An independent judiciary is its conscience- keeper. Neither the Constitution nor the Bill of Rights is a self-executing instrument. It depends on the interpretation placed by the judges. And whether the judiciary is the protective sentinel of our

rights under the Constitution will depend upon its interpretation of the Constitution and, in particular, of the Bill of Rights. A most generous Bill of Rights can be reduced to arid parchment promises by narrow and insensitive judicial interpretation. It is well to remember the dicta of our Supreme Court that 'a Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently has to be adapted to the various emerging situations.'

The Supreme Court by remarkable craftsmanship has incorporated into Fundamental Rights some of the Directive Principles, such as those imposing an obligation on the State to provide a decent standard of living, a minimum wage, just and humane conditions of work, and to raise the level of nutrition and of public health. Thanks to this judicial technique, some socio-economic rights have been given the status of Fundamental Rights, and they have been made living realities for some indigent and downtrodden segments of Indian humanity. And that, to my mind, is a salutary forward step in the enlargement of Fundamental Rights.

According to our Supreme Court, 'a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilized but remains flexible enough to meet the newly emerging problems and challenges.' Courts should place a 'generous interpretation avoiding what has been called the austerity of tabulated legalism', remembering that the letter killeth, but the spirit giveth life.

Part IV of the Constitution of India lays down Directive Principles of State Policy. In substance they are in the nature of social and economic rights. Although Directive Principles are not on the text of the Constitution enforceable by any court, they are 'nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws' (Article 37 of the Constitution).

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The expression 'life' in Article 21 of the Constitution has received an expansive interpretation. The Court has ruled that 'life' does not connote merely physical existence, but embraces something more, namely, 'the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head.'

Based on this interpretation, the Supreme Court has ruled that the right to live with human dignity encompasses within its ambit, the protection and preservation of an environment free from pollution of air and water. The Court has issued numerous directions regarding polluting industries, vehicular traffic and related matters. Health and sanitation have been held to be an essential facet of the right to life. Consequently, the Court has intervened and provided relief to inmates of asylums and so-called 'care homes' who were living in sub-human conditions.

Article 21 of the Constitution provides that 'no person shall be deprived of his life or personal liberty except according to procedure established by law'. What is the reality about the content and effective enforcement of this right?

In its first historic judgement delivered on 19 May 1950 in a matter arising out of the detention of well-known Indian communist, A.K. Gopalan, the Supreme Court placed an unduly narrow and restrictive interpretation upon Article 21. The majority held that 'procedure established by law' means any procedure established by law made by the Union Parliament or the legislatures of the States. It refused to infuse the procedure with principles of natural justice and concentrated solely upon the existence of enacted law.

It was after three decades that the Supreme Court overturned its previous decision in *Gopalan* and held in its landmark judgement in *Maneka Gandhi*

that 'procedure contemplated by Article 21 must answer the test of reasonableness. It must be "right just and fair", and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirements of Article 21 would not be satisfied'.

In India, one witnesses the horrific spectacle of numerous undertrial prisoners languishing in jails for periods longer than the maximum term for which they could be sentenced on conviction. This is because of the inordinate delays in criminal trials. Faced with this situation, the Supreme Court ruled that speedy trial is an integral and essential part of the Fundamental Right to Life and Liberty.

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A procedure whereby undertrials remained in jail for such long periods was not fair, just and reasonable, and therefore Article 21 is violated. As a consequence, numerous undertrials have been released. This has provided much needed relief to them.

Rights without remedies are useless. A mere declaration of invalidity of a detention order or seizure of the press or revocation of a licence to carry on a business would not provide a meaningful remedy to a person whose Fundamental Rights have been violated. To drive such a person to adopt separate proceedings for recovery of damages in tort would be onerous.

Hence, in its landmark judgement in *Nilabati Behera,* the Court awarded compensation to the victim whose Fundamental Rights under Article 21 were violated. The Court pointed out that the compensation awarded by it was not to be equated with damages in a civil action for tort, but was grant of relief under public law 'for the wrong done due to breach of public duty of not protecting the fundamental rights of the citizen'.

Mention must be made of the Supreme Court's judgement delivered in 1997 in the case of *Visakha*. The Court held that sexual harassment of women at the

workplace violates Articles 14 and 21 of the Constitution. Thereafter, it issued several directions defining what would constitute sexual harassment, the means to redress the same, and the penalties that may be imposed for sexual harassment. The directions of the Court would be binding under Article 141 of the Constitution. Frankly, this was a clear instance of ad hoc judicial legislation. However it should be noted that the Supreme Court made it plain that its directions will hold the field till Parliament has enacted requisite legislation. The Sexual Harassment of Women at Workplace Act was enacted in 2013, that is, 16 years after the Supreme Court judgement in the *Visakha* case. Thanks to the Supreme Court judgement in *Visakha*, many women at the workplace have obtained relief and the evil of sexual harassment, though not eliminated, has been mitigated.

The most notable achievement in the protection and promotion of Fundamental Rights has been the development of Public Interest Litigation (PIL) in India. PIL is a form of legal proceeding in which redress is sought in respect of injury to the public in general, and for the enforcement of the rights of a determinate class or group of people injured by the act or omission complained of, but who are unable to approach the court on account of indigence, illiteracy or social or economic disabilities.

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For example, prisoners or inmates of care centres or mental homes or landless labourers. In view of these harsh realities, the Supreme Court has departed from the traditional requirement of *locus standi*, which requires that if A's rights are violated, B cannot approach the Court complaining of violation of A's rights. The Supreme Court in its historic judgement in *S.P. Gupta*'s case declared that where judicial redress is sought for legal injury to disadvantaged persons, any member of the public acting *bona fide* and not for oblique considerations can maintain an action on their behalf. The Court has forged

new tools, devised new methods and adopted new strategies. For example, in the case of *Bandhua Mukti Morcha* relating to bonded labourers, it has appointed commissions for the purpose of gathering facts and data. It has sometimes appointed a district magistrate, or a district judge, sometimes a professor of law, and at times, a practicing advocate for the purpose of carrying out an inquiry and making a report to the court.

There can no doubt be and have been problems with PIL. The three pitfalls or perils of PIL are that it may degenerate into private interest litigation; political interest litigation; and publicity interest litigation. Litigants, lawyers and even judges are not immune from these perils, especially the craving for publicity. Sometimes judges do pass orders and directions which do more credit to the heart than to the head, and which are clearly in the realm of administration and can have fiscal implications. For example, the Court in the Care Home case rightly directed the State to alleviate the conditions of the inmates regarding absence of sanitation and a proper room. But thereafter it appointed a manager at a certain monthly remuneration. That was beyond the judicial sphere. It is at times forgotten that PIL is not a pill for every ill like trams not running on time or rise in the price of onions. Besides, PIL can be abused and that can add to the burden of arrears and in some cases lead to confrontation with the executive.

Nonetheless, on balance, it can be confidently said that thanks to PIL, enjoyment of Fundamental Rights has become a living reality, to some extent, for at least some illiterate, indigent and exploited persons. Numerous prisoners languishing in prisons awaiting trial have been released; persons treated like serfs and held in bondage have secured freedom and have been rehabilitated; conditions of inmates in care homes and in asylums for the insane, and the condition of workers in stone quarries and brick kilns have been ameliorated. Juristic activism in the arena of environmental and ecological issues and accountability in the use of the hazardous technology has been made possible and has yielded salutary results.

It would not be appropriate to conclude without mentioning that in April 1973 in *Keshavanand Bharati,* our Supreme Court propounded a unique doctrine. It

held that the power of amendment of the Constitution, although plenary in terms of Article 368, is not absolute and cannot be exercised so as to destroy its essential features and thus damage the basic structure of the Constitution. The consequence is that Parliament is not supreme even when it exercises its constituent power of amendment and the last word rests with the Supreme Court.

This decision was much criticised when it was delivered. Critics vociferously urged that the Supreme Court had, by this judgement, assumed ascendancy over the amending power given in the Constitution and had vastly and unwarrantedly expanded its power. Another criticism was about the lack of unanimity among the judges as to what constitutes the 'essential or basic features' of the Constitution.

Historical facts and background must be kept in mind. Before the judgement in *Keshavananda Bharati's* case, on account of the steam-rolling majority which the Congress Party enjoyed in Parliament, laws which were severely violative of Fundamental Rights were passed in both the Houses as a matter of course without any serious debate or discussion, and thereafter were placed in the 9th Schedule of the Constitution. This made them immune from challenge on the ground of violation of Fundamental Rights. The enormity of the constitutional amendment sought to be made in order to validate the election of Mrs. Indira Gandhi, which was declared invalid by the Allahabad High Court, dispelled initial doubts to some extent about the wisdom and efficacy of the doctrine of basic structure.

An 11-Judge Bench of the Supreme Court in the case of *I.R. Coelho* vs. *State of Tamil Nadu,* decided on 11 January 2007, comprehensively considered the doctrine of basic structure at length. The Court, *inter alia,* ruled that depending on the nature of the Fundamental Right and the extent of its invasion in a given case, it could be said in a particular case that the basic structure of the Constitution was damaged. The Fundamental Rights which the Court thought embodied the core values of the Constitution are Articles 14, 15, 19 and 21.

Thus, these Fundamental Rights have been accorded supremacy and the basic structure doctrine has been expanded.

No doubt the basic structure doctrine presents some problems, especially about identifying which are the essential features of the Constitution. At present, judicial consensus seems to be that democracy, secularism, federalism, rule of law and an independent judiciary with power of judicial review can be regarded as essential features of the Constitution.

There is some force in the argument that the Supreme Court, in evolving this basic structure doctrine, has in effect amended Article 368 of the Constitution which confers plenary power for amendment of the Constitution without any restriction on the ground of damage to the basic structure of the Constitution. On the other hand, it must be remembered that thanks to this doctrine, no party having an absolute majority in either House can effect a constitutional amendment which would make India a theocratic State by providing that only members of certain communities alone can hold the office of President, Vice-President, Prime Minister and Chief Justice of India. Thanks to the basic structure doctrine, provisions for periodic free and fair elections cannot be repealed from the Constitution, nor can it be provided that elections would take place if and when the executive decides to do so, instead of every five years, and thereby make a mockery of democracy. Because of the basic structure doctrine, the judiciary cannot be deprived of the power of judicial review, nor can the rule of law be abrogated. Again, thanks to the basic structure doctrine, federalism cannot be obliterated and States cannot be made vassals of the Centre. These, to my mind, are tangible and substantial benefits flowing from the basic structure doctrine which has, above all, preserved the integrity of our Constitution. This is not a mean achievement for which we are thankful to our Supreme Court.

Some concluding thoughts: in countries like India, where Fundamental Rights are violated every day, whether in flouting of labour laws, illegal detentions, discriminatory actions and other violations, there is the usual cynic's taunt

about the futility of Fundamental Rights. How should we respond? The answer is that guaranteed Fundamental Rights empower citizens and groups fighting for justice to approach the Court. It also provides opportunities for vindicating the Rule of Law. It establishes norms and standards which can be used to educate people to know, demand and enforce their basic rights. It has a salutary effect on administration which is made aware that it has to conform to the discipline of Fundamental Rights. Above all, Part III of our Constitution guaranteeing Fundamental Rights and their judicial enforcement, which is a constant reminder that the powers of the State are not unlimited and that human personality is priceless. And that is the essence of a vibrant democracy guaranteeing fundamental freedoms to its people and securing their enforcement by an independent judiciary. We must ensure that this quintessential feature is always preserved in our country and the Rule of Law always prevails.

Soli Jehangir Sorabjee started legal practice in 1953. He was designated Senior Advocate, Supreme Court 1971; Solicitor General for India, 1977-1979; Attorney General for India, 1989-1990 and Attorney General for India, again 1998- 2004. In October 1997, he was appointed by the United Nations Human Rights Commission as Special Rapporteur to report on human rights situation in Nigeria. He was Member of the UN Sub-Commission on Promotion and Protection of Human Rights for four years from April 2002; and unanimously elected [in July 2004] as Chairperson of the 56th Session of the UN Sub-Commission. He has appeared in important cases in the Supreme Court of India especially dealing with fundamental rights and in particular with freedom of speech and expression. He was conferred the ***Padma Vibhushan*** [the second highest civilian award of the nation] in March 2002. On 16th March 2006 he was appointed an Honorary Member (AM) by the Commonwealth of Australia in the General Division of the **Order of Australia**. He writes a regular fortnightly column in a national daily.

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