

Shri Mahaveer Chand Bhandari Memorial Lecture 2007

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THE PERSONALITY OF A JUDGE

It is a great honor to deliver the Shri M.C. Bhandari Lecture. One of the most respected members of the Bar, Shri Bhandari was a gifted judge of matters, and of people, and had a plain, clear and distinct writing style. His epigrammatic writings reflect the agitations of a changing civilization and social order that demanded from its members an expression in the forever altering forms of law and a jurisprudential philosophy sufficient to justify the changes. He ensured that the rule of law was always placed on the highest pedestal, and given the greatest regard while deciding a matter. He had the innate ability to balance the values of liberty, freedom and democracy and sustain the social fabric that our Constitutional Framers toiled hard to create. This requires not only a profound knowledge of the law, but also an equally profound allegiance to the Rule of Law. Moreover, that two of Shri Bhandari's chamber juniors have risen to be my Brother Judges at the Supreme Court of India bears testimony to his diverse abilities and adherence to moral and legal values.

The life and work of Shri Bhandari reveals the profoundness of an unblemished character that is fashioned through years of meticulous work

towards improving humanity through the relentless pursuit of justice. This Lecture Series form a fitting tribute to the great eruditeness and adroitness that stood as the hallmarks of Shri Bhandari. He was a friend, guide and philosopher to all whose lives he helped shape. His sense of duty towards the profession serves as constant inspiration for those who knew him and shared in his intellectual humility and open, receptive mind. He will forever be revered for his courage and infallible moral fiber that stands as a guiding light for all those striving to do constructive service to the legal profession. The Bar Council of Rajasthan, of which he was a distinguished member, has been greatly enriched from the spiritual and intellectual harvest of Shri Bhandari's life.

I will attempt to bring into perspective the essence of the personality of a Judge and how, through its fluidity and dynamism, it attempts to maintain a continuous fruitful contact with the changing perceptions of society and the law, which form the background of most legal controversies. Though the mosaic of traits that judges possess can never be exhaustively dealt with on paper, it will be my endeavor to give some psychological insight and depth into the vicissitudes of a personality required for one human being to judge another.

Judging is a great art, and not all are adept at it. Judges are humans, who, as a result of long years of legal practice and intellectual exercise, are able to exercise the delicate and exquisite skill of judging the conduct of others. Despite its frustrations and the difficulties it entails, judicial work, in the

words of Lord Halisham, is “*a privilege, a pleasure and a duty*”. As Justice Learned Hand explained eloquently in his work, “The Preservation of Personality”, a judge’s life is strewn with “senseless bickering” and “captious pettifogging”. However, he goes on to say that if that were the only thing in a judge’s life, it would be reduced to misery. On the other hand, says Justice Hand,

“...there is something else that makes it...a delectable calling. When the case is all in, and the turmoil stops, and after he is left alone, things begin to take form. From his pen or in his head, slowly or swiftly as his capacities admit, out of the murk the pattern emerges, his pattern, the expression of what he has seen and what he has therefore made...That is a pleasure which nobody who has felt it will be likely to underrate.”

Thus, in order to create one’s own “expression”, the judge must administer justice according to constitutionally mandated systems and rules laid down by society. This cannot be achieved by the performance of a mere mechanical craft, but with the intellectual implementation of an innovative and refreshingly creative art, which requires great objectivity, and the ability to look at a dispute without fear or fervor. In *Rochin v. People of California*, [342 U.S. 165, 171-72 (1951)], the Supreme Court of the United States, speaking through Justice Frankfurter, stated,

To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism,

incertitude that one's own views are incontestable and alert tolerance toward views not shared... They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Though Justice Frankfurter spoke in the limited context of interpretation of the due process clause, what he says can well be applied generally to judges and judging. A judge of any court, subordinate or superior, exercises great power when, through his judgments, he gives life to the inert, black-and-white words of the law. He exercises greater power when he strikes down *ad hoc* and arbitrary measures of the Legislature or the Executive which breach constitutional or statutory rights. In exercising this immense power, the judge must apply great caution and necessarily limit himself to, in the words of Justice Frankfurter, in the case of *Malinski v. New York*, [324 U.S. 401, 417 (1944)],

“... the limits of accepted notions of justice...”

A judge's personality is often dissected by a nation's vast populace, who often make arduous attempts to demystify the complex contours of his persona, by a thorough analysis of his judgments, in order to ascertain which facet of his personality held sway above all others, and which part of him influenced his decision the most. Ever since time immemorial, scholars have tried hard to ascertain various facets of human personality, from the four “temperaments” of the ancient Greeks, to Spranger's “six life types” and Jung's “psychological types”. Many have undertaken scientific experiments on personality, dissecting various glands as well as analyzing build, voice and other physical and mental aspects. Others have attempted

to create personality tests that would ascertain a minimum level of intelligence required to be a judge. However, what is most important while discussing a judge's personality is the human underneath the robe. No part of a judge's personality can be alienated from the rest, and no part plays a more significant role than the other. It is his person, his inner being, "him", that influences his decisions, and it would be impossible to segregate one facet of the personality from another. Each judge is unique and distinct from his Brothers, and his beliefs may even change with change in his intellectual, cultural, political and social surrounding. Many a time, a Judge may exhibit varying personalities, reacting differently towards different types of cases, seemingly, like a new leaf. This can be understood only if we first assume that judges, like all other people, are the products of upbringing and surrounding interactions, which constantly intermingle and enrich each other. No one can dispute that the personality and interests of a judge critically influence the manner in which he decides a particular case before the court. To say that by taking the oath to a judicial office, and putting on a robe, the individual loses his individuality and becomes a thinking machine would be a dangerous proposition indeed.

The Deuteronomic Code of the Old Testament aptly summarizes the personality of a judge in the following words:

"And I charged your judges at the time, saying, Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him. Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man. ..." [DEUTERONOMY c. I, vs. 16-17]

It must be remembered that the fullness of a judge's personality comes to fore only after he assumes office, and never before. In the words of Lord Coleridge,

"It is one of the curious things about our profession that you can never tell what sort of a man a judge will be".

However, Judge Shientag, in his Cardozo Memorial Lecture on "The Personality of the Judge", answers Lord Coleridge by stating that one can tell,

"what sort of a judge a man will be".

While saying this, he directs us towards certain traits that a lawyer must be imbued with, in order to be allowed to assume judicial office. It is these essentials that every judge must possess, as vital aspects of his personality, and it is these that I will explore today.

A personality has various facets. It may be endowed with characteristics that reflect skills and assets, which may be acquired by practice or self-control. It may also possess certain unique gifts and virtues which might even be inborn. Out of this kaleidoscopic mosaic, I will highlight one important façade of each skill, asset, gift and virtue. In the end, I will examine the necessity for the personality to be imbued with knowledge, such that every word, spoken or written, echoes of the individual within.

The Skill of Creativity

Society is always in a state of continuous change. As each day passes, conditions arise, which lead to new legal disputes. Each such dispute gives birth to new law, or new interpretations of existing precepts. Thus, law becomes a living entity that is forever trying to satisfy the diverse and dynamic needs of society, a process that Roscoe Pound refers to in his magisterial work "The Philosophy of Law", as

"a continually more efficacious social engineering."

For interpreting the law, Pound, in an article in the Harvard Law Review [*The Theory of Judicial Decision* 36 Harv. L. Rev. 641] identifies three crucial elements; viz., a set of "more or less defined" legal principles, a "body of traditional ideas" and "a traditional technique of developing or applying them" and lastly, a "body of philosophical, political and ethical ideas as to the end of law...with reference to which legal precepts and the traditional ideas of application and decision and the traditional technique ..." are shaped and applied. Among these, the third, i.e. the philosophical, political and ethical view of a Judge is the most important, and this forms the core of his personality, because judges reflect the philosophical, political and ethical view of their time and their judgments mirror the needs of a dynamic society, forever improvising and venturing to discover various ways to fulfill those needs.

Therefore, it is essential for a judge to be creative in his ideas, and also be a great thinker, ahead of his times, who is able to identify and justify the

needs of society, and suggest ways to address them. This not only requires an application of knowledge, but also necessitates immense personal integrity. The great Justice Cardozo, in his excellent and forever relevant work, *"The Nature of the Judicial Process"*, presents an admirable insight into the creative personality of a judge when he states that,

"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them-- inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense of James' phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own. To that test they are all brought--a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter."

To be creative means to be original, to free oneself from the shackles of established norms and delve deep into the pursuit of new ideas that reshape the norm of the day and provide a new vista of law and legal understanding and interpretation to the world. For this creative legal development to find success, the judge must have this skill deeply engrained within his personality, in order subconsciously apply it and hone it with each passing day. A creative mindset makes the legal process

purposive and solution-centric. Lord Radcliffe, in his work, “Not in Feather Beds”, opines,

“The law has to be interpreted before it can be applied, and interpretation is a creative activity.”

However, it is important that this creativity be exercised with restraint, and a judge must be careful not to tread upon the feet of the legislator. He must limit himself to the application and development of the fundamental principles that form the core of our legal values.

The Asset of Independence

For a judge to make a decision without fear or fervor, his personality must be assisted by the asset of an independent nature. “Independence” does not refer merely to an independent attitude, but includes one’s behavior towards others, including family. In *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee* [(1995) 5 SCC 457], the concept of judicial independence was described in the following manner,

To keep the stream of justice clean and pure, the Judge must be endowed with sterling character, impeccable integrity and upright behaviour...They should be men of fighting faith with tough fiber not susceptible to any pressure, economic, political or any sort. The actual as well as the apparent independence of judiciary would be transparent only when the office holders endow those qualities which would operate as impregnable fortress

against surreptitious attempts to undermine the independence of the judiciary.

An independent character is the bedrock of impartiality, and the former forms a means to the latter. No judge worthy of the seat he sits on would allow himself to be darkened by the cloud of prejudice that may loom above him, trying to influence his decision. Justice Gajendragadkar, in his memoirs, fondly recalls various incidents and strongly emphasizes on the necessity of independence for a judge, who must always maintain a cautious discretion, especially in social gatherings, where any of the guests could later be a party to a case before the very same judge. However, this does not imply that a judge should be so aloof from social ripples that he becomes distant from the realities of society. Rather, independence implies caution, it implies restraint.

Independence from oneself is another facet of this asset, and perhaps the most challenging. A judge often faces great pressure not only from society, but also from within himself. In such circumstances, it is imperative for a judge to stand by his conscience, and do what it says is right. To be concerned with how a decision would appear in the eyes of others would be quite damaging to the concerns of justice. It is worth quoting Lord Mansfield, in *Rex v. Wilkes* [98 Eng. Rep. R. 327 (1770)]. He said,

“I will not do that which my conscience tells me is wrong...to gain the huzzas of thousands or the daily praise of all the papers which come from the press. I will not avoid doing what I think is right though it should draw on me the whole artillery of libels...”

A strong sense of independence goes a long way in cultivating the habit of “closed eyes and open ears”, that is, blind towards the parties, but open ears to law. For a judge, there should be no other power greater than that of the law, and it is this power which he must exercise at all times, sometimes standing alone in the midst of a great tempest of political or social fervor trying to make the judge succumb this way or the other. Impartiality, I reiterate, like independence, does not imply that a judge shuts himself from the winds of his own personality and assumes the demeanor of a machine. While coming to a decision, the judge’s individuality, character, interests and his overall persona all come to play and this is part of human nature. Harold Laski, in a letter to Justice Holmes once wrote that he

“wished that people could be persuaded to realize that judges are human beings; it would be a real help to jurisprudence”.

Impartiality implies that the judge has a clear understanding of the differing viewpoints involved in a dispute and is able to appreciate them fully, before coming to a reasoned decision. To achieve this end, a judge’s creative faculties and his personality play an important role in balancing competing analogies. A diverse and vibrant personality leaves an indelible mark on the judicial process. It is important the judges realize that all men have a natural bias of mind. Once this is understood, a judge will make a more determined and conscious effort to ensue impartiality as opposed to one who believes that judges are infallible ethereal figures. Independence and impartiality mean a greater understanding of one’s emotional tremors,

making a thorough foundation for a judgment with effective research, openness to differing viewpoints, a stately detachment from presumptions and instant conclusions and a reflective thought process. All of these working conjointly ensure impartiality and independence.

Another facet of impartiality is to remain free from pressures and influences by the other arms of the state, i.e. the Legislature and Executive. The duty of judges, as upholders of the rule of law, is different from that of public servants. Though judges are public servants, they do not have an obligation to serve the public *per se*, but rather have an obligation to serve the will of the Parliament and the Constitution, and to administer justice with independence and without prejudice to policy. On the other hand, “public servants”, like bureaucrats, ministers and the like are obliged to further the policy of the government.

It is the duty of all judges to respect and maintain this independence.

The Gift of Courteous Demeanour

As repositories of the rights of the people, courts rest on the bedrock of public confidence and faith. Judges, therefore, must make all efforts to maintain this confidence. A judge who is arrogant would soon lose his credibility. Sobriety in behavior is the hallmark of a judge. I refer to Courteous Demeanour as a gift because often, it is difficult for those reposed with great responsibility and power to refrain from “wielding the sword” of that power in places where it would be better to sheath it. The demeanour of a judge includes patience, decency, decorum and other like

traits. The conduct of the Bench towards society in general, towards the Bar, and towards litigants and court staff, is significant. All must be treated with courtesy and respect. The bench should command respect from others, and not demand it. Since no human is alike, it is difficult to gauge the framework of courtesy, because for one, consideration for the feelings of others may be an inherent part of his personality, and for another, it may have to be imbued and practiced until it is firmly welded into routine behavior. An offensive demeanour often leaves the receiver with a sourness that greatly affects his faith in the person, as well as the system at large. All who approach the doors of the court must feel relaxed and at ease at once, and judges in particular have a great role to play in advancing this, for with a superciliousness of manner, a judge can easily destroy the serenity of the courtroom. In the words of Lord Macmillan, in *Law and Other Things*, which he penned in 1937,

“Courtesy and patience must be more difficult virtues to practice on the Bench than might be imagined, seeing how many otherwise admirable judges have failed to exhibit them; yet they are essential if the courts are to enjoy public confidence”.

It must be remembered that the greatest social service that a judge renders to society is the maintenance of social equality and removal of social injustice. Most litigants appearing before the courts are lambs threatened by the lion. Thus, while hearing these people, a judge must be extremely patient and courteous towards them, while at the same time showing firmness to maintain the decorum of the court. He must appear, at all times, to be serene. In the words of Devlin, in his reflective work, “The Judge”,

“The judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven, but on earth he is no use at all.”

Thus, every judge must bear in mind what is before the public forms public impression. For this impression to be secured with confidence, a judge’s demeanour, natural or practiced, must at all times be civilized and courteous. It must also be understood at the same time that as human beings, judges too have occasional outbursts. However, these instances are few and far between, and arise only on account of extreme mental pressures, which are immediately addressed by the judge’s strong inborn sense of dignity and respect towards the office that he holds.

According to Hindu philosophy, a judge is one who is possessed with a rare élan and calmness that fuels his intellectual clarity and gives him self confidence. Thus, when a garland of flowers is placed around his neck, they would remain fresh forever, because his demeanor would be like the soothing fresh water of a spring that brings exhilaration to those who drink from it, and would preserve, for posterity, the freshness of the flowers.

The courtesy of a judge must also extend towards his fellow judges, as well as towards lower courts. This is essential for maintaining the solidarity of our independent institution, and fostering a spirit of fraternity. Judicial propriety is one of the most noteworthy aspects of judicial courtesy, and must form the bedrock of judicial institutions. Judgments by earlier benches, whether the bench is equal or superior in number, should not be made subjects of unnecessary criticism. Academic and informed criticism of

judgments is the role of the nation's academia, and they perform it laudably. However, to criticize its own judgments, past or present, it is not a function of the judiciary. If a judge is of the opinion that previous judgments differ from his own view on the subject, then he ought to state his points difference with reasons thereof, paying utmost courtesy to the judges of the past judgment. It must be remembered that past judgments are not incorrect in law; they reflected the law as it then was, and as it then stood. To differ from them is to record a change in social, cultural and legal philosophy, but at the same time, full respect must be accorded to past benches. It is the judgments that are differed from, not the judges themselves.

Moreover, as the guardian of fundamental rights of the people, the Supreme Court is endowed with great responsibility. Along with this responsibility comes caution of exercise of power. A judge must draw a balance between when to exercise the power of his pen and when not. In the highest court of the land, this is fundamental. However, the judge must be unhesitant to exercise his powers whenever an apparent need arises, and whenever the fundamental rights of the people are infringed by other private or state actors. This is the cardinal duty of the Supreme Court of India, and this is what differentiates its functioning from other courts. Furthermore, judicial review has long been upheld to be a part of the basic structure of the Constitution, and to say that judicial review impinges on the doctrine of separation of powers is an argument that holds no ground. The doctrine of separation of powers is widely misunderstood to mean a staunch separation between administrative, legislative and judicial functions. However, this is not so. These functions cannot operate

independent of each other, and, like spokes in a wheel, play their own independent, yet indispensable role in the governance process. Effective governance requires that all the abovementioned organs function towards the constitutional goal of ensuring that each citizen enjoys the fundamental rights available to him. Whenever this constitutional goal is not espoused, partly espoused or infringed with arbitrariness, it is the inherent duty of the Supreme Court to take cognizance of its function as the upholder and protector of the Constitution, and eschew the act which curtails fundamental rights. Particularly, realization of the Right to Life, which has been interpreted to mean not mere animal existence, but fruitful living, can come only if the people enjoy their fundamental rights such as living in a healthy, clean and safe environment, compulsory education and access to basic amenities of life. Without these rights being protected, the spirit of Article 21 can never be realized. On various instances, the State failed to exercise its duty of providing these rights to the people, who often had to suffer for no fault of their own. Therefore, it became an imminent necessity for the Supreme Court to intervene in a timely manner and curtail the violation of fundamental rights, and further its duty to protect the rights of the people.

The Virtue of Sympathy for Societal Needs

To lend a sympathetic ear to the most pressing needs of society is a quality that every judge ought to inculcate in his personality. A judge is a crusader and a saint at the same time, relentlessly striving to correct arbitrary measures and wrongs that often plague our social system and bring about equity, dissatisfaction and frustration for the common man. Social

consciousness is thus a prerequisite for a judge in our diverse societal system that has suffered since centuries by man-made divisions, often fuelled by the invaders. Our diversity is our strength, but when we reflect upon our great nation, we find that it is fraught with tensions and frictions that are often deliberately designed by one group to gain dominance over another. So it becomes necessary for judges to look at the future through the lens of the past, in order to understand the present and attempt to forge a brighter future.

We have pledged ourselves to one nation and one Constitution that governs us all, big or small. Therefore it is incumbent that we look at those who are distanced from the promises of the Constitution. For a judge, this is paramount, for is his inherent duty to act as a harbinger of light for those shrouded with darkness and for those, in the words of Justice Krishna Iyer, “dismally depressed” sections of society. In the words of Louis Craco, while delivering the 2006 Orison S. Marden Lecture at the New York Bar Association,

“To balance the equally proclaimed values of liberty and justice, freedom and democracy, in short to sustain the social order to which we pledge our allegiance requires an equally sturdy allegiance to the Rule of Law.”

The need for this allegiance arises from a need to be aware of social tensions and strive to remove them, thus alleviating the deprived millions of their misery. Societal consciousness, as an engrained virtue at the very root of a judge’s personality, would enable him to create indispensable instruments by which he pursues the path to infuse equality in society,

creating conditions which enable all to enjoy the fruits of our constitutional promises to the fullest. The work of a judge is delicate, for he has to provide a solid foundation for a just social order while leaving as much space for freedom, exchange of ideas and innovativeness in society, which are essential for development. A judge creates a system which can give stability and allow ordinary people to flourish to the best of their abilities, and resolve disputes amicably. The judge, therefore, belongs to a very society-centric profession, and therefore his personality must be imbued with this value, above all others. In India, the role of the judges is in a state of constant change, and Supreme Court of India has, through the advent of techniques like public interest litigation, continuous mandamus and expanding the scope of Article 21 tried to come at par with changing needs of society.

The Chief Justice of Canada, the Right Honourable Beverley McLachlin, in a speech on “The Role of Judges in Modern Society”, commented that,

In the latter part of the twentieth century, the lawmaking role of the judge has dramatically expanded. Judicial lawmaking is no longer always confined to small, incremental changes. Increasingly, it is invading the domain of social policy, once perceived as the exclusive right of Parliament and the legislatures.

A judge must thus be sympathetic towards his fellow beings, and also have a strong sense of social engineering. He ought to be able to sense social forces and should strive to attain the aspirations that the fathers of the Constitution have set before us.

The Quintessence of Knowledge

While courts are the repositories of the rule of law, judges are the epitomes of knowledge. They must necessarily possess the quintessence of knowledge as an essential trait in their personality, such that it is reflected in every word penned by them. Arguably, knowledge is not a personality trait, but is rather something which is acquired through learning. However, for a judge, it is important for his personality to be embedded deeply within the spheres of knowledge, if he is to be able to make reasoned judgment. As Justice Learned Hand said, during Chief Justice Stone's Conception of the Judicial Function in 1946,

"...it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, Search Term Begin as Search Term End with the Search Term Begin books Search Term End which Search Term Begin have been specifically written Search Term End on the Search Term Begin subject Search Term End . For in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than mere verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which

demand new schemata of adaptation; which will disrupt it, if rigidly confined.”

The value of knowledge, especially for judges, has also been noticed by the Supreme Court of India in *Hindustan Times Ltd. v. Union of India*, [(1998) 2 SCC 242], where the court emphasized on the need for judges to equip themselves with the necessary tools required to write qualitative and thought provoking judgments.

All that I have spoken of above-Creativity, Independence, Courteous Demeanour and Sympathy for Societal Needs, would lose their meaning without being infused with the nectar of Knowledge, for it is knowledge that permeates all- the person, the personality and its personification. Without knowledge, a lawyer would soon find himself in the midst of darkness, and would never transcend to the bench. Moreover, the decisions that judges take often affect the lives of many, for whom the courts are the last bastion for justice and hope. Thus, it becomes imperative for a judge to be knowledgeable, in order to make informed and articulate decisions, for judgments are not smorgasbords of issues or ideas, they are specific, subject oriented and coherent, playing the important role of interpreting the law of the land. This is a great responsibility indeed, one that every judge ought to perform with extreme caution and diligence, which can come only with knowledge.

I would like to conclude this address with the words of Benjamin N. Cardozo, the great American Judge, who, in his everlasting work, “The Nature of the Judicial Process”, noted that,

“The future, gentlemen, is yours. We have been called to do our parts in an ageless process. Long after I am dead and gone, and my little part in it is forgotten, you will be here to do your share, and to carry the torch forward. I know that the flame will burn bright while the torch is in your keeping.”