

World of All Human Rights

Soli J. Sorabjee
A Festschrift



Edited by
R.N. Trivedi
Former Addl. Solicitor General of India

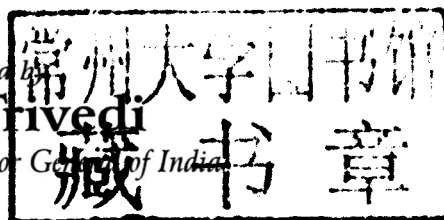
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World of All Human Rights



सत्यमेव जयते

उपराष्ट्रपति, भारत

VICE-PRESIDENT OF INDIA

MESSAGE

It was Justice Oliver Wendell Holmes of the U.S. Supreme Court who describes Law as 'a mistress to be wooed with sustained and lonely passion - only to be won by straining all the faculties by which man is likeliest to be a God.' Both aspects of this somewhat archaic yet telling simile hold good for Soli Sorabjee. He personifies professional excellence, depth of scholarship, and diversity of interests that together provide nourishment for the intellect and the soul. A *festschrift* on his eightieth birthday is thus a proper and scholarly tribute by peers and admirers to his life-long contribution to public life.

Soli Sorabjee's defence of basic human freedoms and rights of the weaker segments of society is well known nationally and internationally and has earned him the respect and gratitude of many. His perspective on contemporary debates and the legal issues involved is enlightening.

I am happy to join his friends and admirers in wishing him a very happy 80th birthday. I wish him many more years of good health and service to public causes.

New Delhi

(M. HAMID ANSARI)

February 15, 2010

K.G. Balakrishnan
Chief Justice of India



*5, Krishna Menon Marg,
New Delhi-110 011*

MESSAGE

I am happy to learn that Shri Soli Sorabjee, former Attorney General for India will soon be celebrating his 80th birthday on March 9, 2010. I would like to extend my heartiest congratulations to him.

Shri Sorabjee is undoubtedly one of our most well-known lawyers, since his name is familiar to persons outside the legal field as well. In a distinguished career as a legal practitioner, author and activist he has been a prominent voice in defence of the freedom of the press, judicial independence and the rule of law. One can only have a deep sense of admiration for his numerous contributions in the form of arguments in landmark cases, writings in prominent journals and speeches at numerous fora. He has done significant work in the area of international human rights by way of acting as a UN Special Rapporteur and serving as a member of several international groups.

Words are not enough to accurately describe Shri Sorabjee's stature and the respect that he commands from the Bar and Bench alike. I take this opportunity to wish him more success in the coming years.

K.G. BALAKRISHNAN

New Delhi
February 11, 2010

MESSAGE FROM LORD JUSTICE HARRY WOOLF

Marguerite and I send you our very warmest best wishes on your 80th birthday. We look back over the long period we have known each other with the greatest of affection and admiration for what you have achieved as an extraordinary personality, a wonderful friend and a huge personality. I hope that for many years to come you will continue to make your singular contribution to the legal system in India and so many countries elsewhere.

We look forward to celebrating this great event with you in London and in the meantime, are honoured to be able to send this message in your second festschrift. Nobody but you would justify a second festschrift!

Our found and affectionate regards,
From Marguerite and myself

Harry
The Rt Hon the Lord Woolf
Former Chief Justice of England & Wales

MESSAGE FROM LORD ANTHONY LESTER

Soli Sorabjee is renowned for his life-long pursuit of justice and the protection of human rights in India and beyond. During the period of emergency in India, he sought to protect free speech and the rule of law. He was an independent and impartial Attorney-General and is a powerful and principled advocate. He has participated in many human rights activities internationally and has many close friends across the world. I am privileged to be one of them and to pay tribute to him as an outstanding jurist.

Anthony Lester

Lord Lester of Herne Hill QC

MESSAGE FROM JUSTICE DOROTHY W. NELSON

Thank you so much for your kind e-mail about the forthcoming festschrift for Soli Sorabjee. How wonderful it is to honour him on his 80th birthday for it is well deserved.

I would have liked to contribute a short article, but your deadline is about 3 months too short. If, you deem it appropriate, I would be pleased to have my short message added to the publication.

To Soli J. Sorabjee,

It was in February of 1985 that I first met Soli Sorabjee when I participated in the World Congress on Law and Medicine in New Delhi, at his invitation. He was one of the organizers of the Congress. I was so impressed by his brilliant legal mind, but even moreso by his warm and friendly hospitality. He invited me to dinner at his home where I was privileged to meet and exchange ideas with many justices, judges, government officials and lawyers. We had so many ideas in common and learned so much from each other. We talked of the need for universal education, the abolition of prejudice, the equality of women and men, and the need for a world federation of nations. It is conversations like these that will help to bring about a more unified world.

Then in 1992, we participated together at the Third International Dialogues "The Transition to a Global Society" at Landegg Academy in Wienacht, Switzerland. He gave a brilliant talk on "Freedom of Expression", a copy of which I have retained in my files. Justice Kennedy of the United States Supreme Court, who was in attendance, said that it was a superb and thoughtful presentation", as indeed it was.

It is my greatest wish that I could be at your 80th Birthday celebration, but my special hope that our friendship will endure.

With warmest congratulations and much affection,

Dorothy W. Nelson, Judge
U.S. Court of Appeals (9th Circuit)

MESSAGE FROM JEFFREY JOWELL

I salute the coming of age of a Master! Soli Sorabjee is one of those men who have made a real difference to our world.

My wife Francie and I cherish his friendship, enjoy his company, share his values, and admire his achievements. We also (mostly) like his taste in jazz.

We hope to see him more often, for when he comes to England he enlivens the legal community and enriches the lives of his friends.

We wish him the happiest of birthdays and many, many more.

Professor Jeffrey Jowell QC

INTRODUCTION

The story of Human Rights in the world, is the story of humans wronged. It is the story of humans left from enjoying equality and freedom in full measure. The State and the Society are equally to blame, as often HUMAN RIGHTS is used as cliché for suppressing the voice of the people and committing atrocities. What is important is not only guaranteeing freedom of speech and expression, but freedom after speech and expression. The countries in the West having utilised slavery, child labour the barrel of the gun, etc., and having exploited the Third World to achieve a level of economic affluence, lay emphasis on the primacy of freedom of speech and expression whereas the Second World laid emphasis on economic development, and in the process either crushed or subordinated freedom of speech and expression. It is sometime urged that HUMAN RIGHTS is a Western concept, something with which others disagree, although initiations of its modern formulation is a result of global concern. The Universal Declaration of Human Rights was enacted in 1945, in view of large scale and horrendous atrocities committed in the name of ethnic cleansing and not because of persistent occupation, exploitation and persecution of the Third World.

Human Rights are not a gift of the Constitution or Legislation. The first continental congress in its Declaration of Rights of 14th October, 1774 considered the "immutable laws of nature as the principle source from which the colonies derived their rights¹. The French declaration propagated that rights of man are 'natural and inalienable' and that to secure these rights, governments are instituted among men deriving their just powers from the *consent of the governed*, that whenever any form of government becomes destructive of these ends it is the right of the people to alter or abolish it".¹ Those who advocate that the formulation of HUMAN RIGHTS is a Western concept would do well to remember that in the code of Hammourabi, King of Bebylon 2000

1. Human Rights in the World, A.H. Robertson & J.G. Merrills.

years Before Christ, it was provided that the duty of the King was "to make justice reign in the Kingdom, to destroy the wicked and the violent, to prevent the strong from oppressing the weak... to enlighten the country and promote the good of people. P. Modinos, 'La Charte de la Liberte de Éurope, Human Rights Journal, VIII, 1975, pp. 677-8. Rights of men were promulgated by Cyrus, the Great about 2000 years back. But, unfortunately the countries which gave the rights of men, today are seen as trampling the voice of people in order to perpetuate a particular social, political and economic order.

It would appear that the basic reason for the violation of HUMAN RIGHTS is the tremendous economic disparities between nations and peoples, leading to discontentment and disenchantment against the global order and the State machinery. This arises from greed and avarice. Whereas, emphasis was laid by the West for the primacy of International Covenant on Civil and Political Rights (ICPR), the then Second World laid emphasis on enforcement of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

More recently, a 3rd Set of rights namely Right to Development has taken frontal space. It is submitted that if ICPR and IESCR are faithfully observed and complied, the resultant would be development. It may however be pointed out that every change does not bring about progress and every progress does not bring about development unless it is truly inclusive. At the macro level, it is disquieting that nations big and small, in order to gain economic superiority would either crush civil liberties, or nations would encourage the subordination of civil liberties to gain either strategic foot holds to attain political hegemony and use it as bargaining power for influence beyond its borders. The nations of the world cannot absolve themselves from the charge of supporting and continuing to support ruthless and authoritarian regimes for their own gains, and still pontificate about Human Rights to the world.

Unfortunately, the 'consent of the governed' is either manipulated by power of the purse or even base considerations of religion, ethnic persuasion, or even language. It was rightly said that in order to retain or regain power, politicians some times even become patriots. Protection of Human Rights is greatly dependent on participative governance.

Post Second World War has seen more casualties worldwide, for gaining areas of influence for raw material and exporting one's political form of government, with scant respect for HUMAN RIGHTS propagated by them. The record of HUMAN RIGHTS in the world is replete with innumerable instances of unmitigated hypocrisy.

The Third World War on destitution, illiteracy and disease has taken a toll of millions. In this war led us stand not between left and right but between right and wrong.

The French declaration of Independence moved an entire nation with the fervent plea for liberty, equality and fraternity. We have taken a few steps to ensure liberty and equality but insufficiently perceptible steps towards achieving fraternity and tolerance on a global scale. Human Rights world wide becomes a casualty to corruption. Is accountability in governance not a Human Right! Corruption eats in the marrow of governance and erodes the rule of law.

Do we not have HUMAN RIGHTS to food and clean drinking water and now even clean air. Merely recognising such rights is not enough. It has to be converted into a reality. As someone rightly said recently at Davos, do we have the right to steal the prosperity and happiness of the future generations.

I am reminded of what was pithily said that "when you kill a man you steal a life. You steal his wife's right to a husband, rob his children of a father. When you tell a lie, you steal some ones right to the truth. When you cheat, you steal the right to fairness". (The Kite Runner, Khaled Hosseini)

The protector of HUMAN RIGHTS in a country is the judiciary. But in the name of internal security, even the right to a fair trial is not only curtailed but denied as in Guantanamo Bay. Rule of Law is subverted in Zimbabwe by packing the Court. The grandmothers of Chile are still seeking justice for the dead and missing during Pinochet.

The Indian Supreme Court, post 1978 atoning for its sins during emergency, has expanded the concept of 'life' in Article 21 of the Constitution not only to mean mere animal existence but that 'life' embraces quality of life and to live with dignity. From jail reforms, and efforts to discipline the police, freeing the air waves from the shackles of the State, and protecting privacy to prescribing method and means to ensure accountability in prosecutions for corruption and bold initiatives taken by it in protecting the environment, it has travelled a long way. The Supreme Court of India would also be remembered for the concept of basic structure of the Constitution and advocating Public Interest Litigation which, however, is being misused to settle scores. It required the prospective candidates for elections to declare their assets, but when it came to its judges declaring their assets, it dithered, faltered, declared and appealed to itself against the judgment of the High Court requiring it to declare the assets of the Judges.

One of the biggest achievements in recent times for protection of Human Rights in India and making the Government accountable is the enactment of Right to Information Act.

Disquieting Voices are being raised about corruption in the judiciary. The Supreme Court as the ultimate protector and saviour of democracy and Rule of Law has to have impeccable reputation, both in its actual functioning, and selecting the personnel to man it. There has to be utmost transparency in the process. It is disturbing to see how the courts are actually functioning.

The ailment of the Indian Judiciary requires, the proceedings of the High Court and Supreme Court to be televised live. Watch the resistance!!

The judiciary of the countries sometimes work under local compulsions, making them subservient. For avoiding equality and fairness becoming casualties several steps have been taken at inter-country level. Significant among those with effective success is the European Court of Human Rights which has even overruled the House of Lords. Even in Africa, the African Charter on Human and People's Rights (1981) and the Protocol on establishment of African Court on Human and People's Rights (1988) has been signed though the Court is yet to be established.

Is it not about time that we, at least, start initiating a debate for an Asian Charter of Human Rights and Asian Court of Human Rights. The Supreme Court of India in *ADM, Jabalpur*, (1976) (2) SCC 521 held that right to life was a gift of the Constitution which could be taken away by the Executive, resulting in large scale atrocities and suppression of Human Rights. Martial Law in a 'democracy' was upheld in Pakistan. Both the decisions resulted in systematic subversion and erosion of Human Rights. With an Asian Court, probably, such aberrations could be corrected.

The world today is witnessing its biggest threat of terrorism of all kinds resulting in not only threat to security of the people but violation of Human Rights. Terrorism cannot thrive without funding. Money laundering world-wide has to be stopped and countries who consider it to be their right, on the ground of confidentiality and business interests need to be made accountable and disciplined.

We are in a state of war to achieve peace. Freedom in all its forms is susceptible to subordination in the name of ensuring peace. War or war-like situations anywhere in the world affects Human Rights not only locally but its reverberation can be heard far and wide.

Luigi, an Italian Historian said that “war brings destruction, destruction brings compassion and compassion brings peace. Peace brings prosperity, prosperity brings jealousy, jealousy brings anger and anger brings war”. Let us strive to break this chain.

Give peace a chance for it is the exalted of Human Rights.

Let us stop being hypocrites. Don't do as I do, do as I preach should as a principle be eschewed. If countries big and small and societies with disparate concerns and persuasion are a little more tolerant, and propagate fraternity, the World of Human Rights would enter the threshold of joy and happiness.

I am reminded of a couplet which reads as under.

तुम चाहो तो हालात बदल सकते हैं,
मेरे आंसू तेरी आंखों से निकल सकते हैं।
तुम ठहरे न रहो झील के पानी की तरह,
दरिया बने तो बहुत दूर निकल सकते हैं।

A freely rendered translation of which is as follows:

*Should you want, the conditions can change
My tears can flow from your eyes
Be not stagnant, like the water in the lake,
If you flow like a river, we can go afar.*

This festschrift being released on the 80th birthday of Soli J Sorabjee is a treat not only for Lawyers, Judges and academics but all those concerned with propagation, protection and preservation of Human Rights. Articles from Eminent Judges, Jurists and academics not only from India but from Australia to Zimbabwe are incisive and thought provoking.

On this occasion, I cannot resist the temptation of writing a few words about Soli. I have been the recipient of his love and affection for over 30 years. I had the privilege of knowing him post-emergency (1978). I admired him for his fearlessness and commitment during the dark days of emergency, when Human Rights were eclipsed. Without care for his own liberty and security he fought the might of the State. Undeterred by circumstances, he stood for his values. My admiration for him has gradually matured to a reverential respect. Many of his friends and admirers may have known him longer and more closely, but I was singled out to even mimic him in his presence and before his

august friends. He even wrote a piece about me in one of his weekly columns. A lover of music, literature and history, he carries his intellect with felicity. If he can burst out into laughter, his eyes can visibly become moist, not only when he is informed of a sad news but while remembering someone who cared for him. I owe to him, the opportunity he gave me to work as a Law Officer of the Union of India when he was the Attorney-General. A Bhaiya from U.P. encouraged by a hard core Parsi from Bombay (sorry Mumbai) tells a story by itself, of a person unbound by shackles of narrow parochialism and shows what a true Indian he is.

He put me on trial on several occasions two of which need mention. On a cold winter evening he called me up saying that there was a crisis and I should come immediately. On reaching, the official residence of the Attorney-General for India, I found him laughing surrounded by his juniors. I was told that I had to appear before the Constitution Bench (presided over by Justice Bhargava), the following day. I inquired if we were petitioners or respondents, he told me that Union of India was respondent. My relief that the petitioner would take some time to argue was short lived when he informed me that they had already concluded their arguments, I survived. On the second occasion, he sent me to appear before a five-Judge Bench at Chandigarh with only the terms of reference and not even the bare Act. Though appearing for the respondents, the Chief Justice who was presiding the Bench asked me to open the arguments. I survived again. I am ever so grateful for the faith reposed in me. He taught me not only to be intrepid but I learnt to live and function as a Lawyer with my wit also in my armoury.

Our grateful thanks to Universal Law Publishing Co. Pvt. Ltd. and especially Sri Manish Arora for their fullest cooperation, without which all our efforts with progressive extension of dead line, would have been vain.

R.N. Trivedi

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