

JUDICIARY

A Battle Supreme



TITLED *Judiciary: Attacks and Survival*, the speech had been long in coming, the speaker delayed, first by an attack of diabetes in March and then by the postponement of the Dussehra break. On October 29, as Justice Vidyaranya Dattatreya Tulzapurkar of the Supreme Court finally faced an invited audience at the Symbiosis Law College in Pune, very few people had an inkling of what he would say.

The speech turned out to be a blistering exposition of petulance and pique, a speech in the greater part of which a sitting judge of the nation's highest court lashed out in a very personal manner at a brother on the Bench. By fortnight's end, poorly reported though it was in the daily press, the speech had set off shock waves in the Supreme Court, and the ripples began to spread through the legal profession.

Acrimony: Twenty-seven foolscap sheets in length, Tulzapurkar's speech was at once a combination of rage and eloquence, and an open declaration of internecine war. Tulzapurkar's primary target was Justice Prafullachandra Natwarlal Bhagwati, himself the controversial head priest of a new and vigorous school of 'activist' law-giving. Over the last few years, Bhagwati has led a movement that has opened up a vast field of public interest litigation, dramatically expanded the definition of *locus standi* of petitioners in such litigation, brought a new meaning to the concept of legal aid for indigent litigants, and transformed the Supreme Court from "an arena of legal quibbling for men with long purses" into a dynamic champion of India's underprivileged poor.

Tulzapurkar, on the other hand, stands at the opposite end of the court's ideological spectrum. A conservative judge, who believes fiercely in the court's need for adherence to decorum and rectitude, and in preserving its independence from the executive's encroachments, Tulzapurkar is only slightly junior to Bhagwati on the Bench, third in line behind Chief Justice Yeshwant Vishnu Chandrachud.

Both Tulzapurkar and Bhagwati lead loose 'camps' among the court's 14 judges, and the court has witnessed a fast-deteriorating rift between the diametrically opposed schools of thought. Nowhere was this more evident than in the Judges' Transfer Case, where a majority of seven judges headed by Bhagwati ruled that the executive held primacy in judicial appointments and transfers, and that the President could even overrule the chief justice in his choice. In the course of his judgment, Bhagwati made what were certainly intemperate remarks about Chandrachud. Worse, both Chandrachud



Tulzapurkar

Tulzapurkar told his audience that the greatest danger to the judiciary was posed by the 'sycophantic element' within it, by judges "whose predispositions and value systems are attuned to those in power".

and Chief Justice of the Delhi High Court Prakash Narain were made litigants in the case, and Bhagwati attacked Chandrachud's affidavit, saying it contained "constitutional incantation" and was "delightfully vague".

In his speech at Pune, Tulzapurkar attacked this "discourteous language" and, ironically enough, quoted former Advocate-General C.K. Daphtary as saying that "...when judges call their colleagues 'my learned brother' they do not mean it". He also took a heavy swipe at the questionnaire circulated by the Tenth Law Commission, of which Justice K.K. Mathew is the chairman, saying that the questions on whether the Supreme Court should be replaced by a constitutional court, and whether Supreme Court and high court judges should have a political background, were directly antagonistic towards judicial independence.

In the major portion of his speech, however, Tulzapurkar tore ferociously at

Bhagwati—without once mentioning him by name—on the following specific points:

► Attacking Bhagwati's penchant for long and erudite judgments, Tulzapurkar said: "I have always felt that while making judicial pronouncements, judges should not indulge in prefaces and exordial exercises, perorations and sermons and theses and philosophies, because a judgment of a court of law and a thesis for a doctorate in law are two distinct exercises...for the litigant, half an ounce of relief is more satisfying than several pages of learning and precept—an exercise often indulged in to project one's image."

► Obviously referring to Bhagwati's eulogistic letter to Indira Gandhi on her re-election in January 1980—where he said "today the reddish glow of the rising sun is holding out the promise of a bright sunrise"—Tulzapurkar told his audience that the greatest danger to the judiciary was posed by the 'sycophantic element' within it, by judges "whose predispositions and value systems are attuned to those in power". Repeatedly stressing that a judge must decide "without fear or favour", he also referred to "a judge" who "sends fawning and flattering congratulations to political leaders on assumption of office", "goes to the airport or railway station with a garland or a bouquet to welcome or see off (the) prime minister", "or seeks favours for himself or for his children or relatives from any quarter—official, business or otherwise".

► On public interest litigation, Tulzapurkar began by saying it was a "happy augury" that the Supreme Court was entertaining complaints in the form of postcards or letters addressed to individual judges and treating them as petitions in order to help the poor. But he came down on "unseemly trends" emerging in this kind of litigation, saying it enabled the complainant to "have a judge or forum of his own choice, which is clearly subversive of the judicial process".

Tulzapurkar argued that such communications should be forwarded by the addressee (who happens to be Bhagwati in most cases) to the court registrar, who would then, through the chief justice,

place the matter before "any bench". He also criticised Bhagwati's decisions to oversee the day-to-day working of the Government Protective Home for Women at Agra, to ensure a speedy trial and supervision of the prosecution in the Bhagalpur blindings case, and to ask the Hyderabad Police to file an affidavit stating what progress had been made in investigating an alleged case of bride-burning. "Should the Supreme Court arrogate to itself the role of a supervising investigator in all such cases?" asked Tulzapurkar rhetorically.

► Returning to the Capital Sentence dissenting judgment delivered by Bhagwati last August, Tulzapurkar referred to Bhagwati's naming of five Supreme Court judges, past and present, "whose presence on the Bench could be regarded as unfortunate by condemned prisoners". First reported in the *Indian Express*, the controversial excerpt from the judgment elicited a quick clarification from Bhagwati, which was published side-by-side with the relevant portions of the verdict. Commenting that such an exercise could only "tarnish the fair name and bright image of the court", Tulzapurkar added sarcastically that "I now understand that by issuing an errata the judge has deleted the reference to the five individual judges by their names from his judgment."

Referring to Bhagwati and Justice D.A. Desai being looked after in Patna by the Bihar Government while the Patna Urban Cooperative Bank Case was being heard in the Supreme Court, Tulzapurkar said: "Judges should realise that if they enjoy hospitality of a minister (Jagannath Mishra) whose personal case is before them they disqualify themselves from hearing it any more."

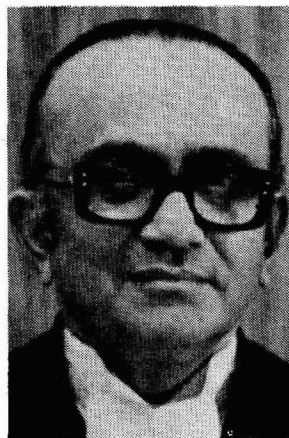
Tulzapurkar also attacked Desai separately without naming him. A Bhagwati protégé, Desai in a recent judgment had criticised the judicial system in India, saying it was "utterly alien to the genius of this country... a smuggled system from across the shores". "All I ask is," thundered Tulzapurkar at his audience, "should he not quit the system if he holds these views sincerely and honestly?"

Overly Critical: Most of the points on which Tulzapurkar attacked Bhagwati have already been discussed in public. It was all the more mystifying, therefore, that he should choose the Pune forum to

pour venom on his colleague, particularly at a juncture when the judiciary is under siege from an executive that has smelt blood after the Judges' Transfer Case verdict. Observers do not deny that Bhagwati has laid himself open to unnecessary controversy and criticism in his zeal and occasional indiscretion. But Tulzapurkar himself drew criticism for his speech, the more so because he had chosen to comment on two *sub judice* cases that are very controversial—the Bhagalpur blindings case and ex-chief minister of Maharashtra, A.R. Antulay's appeal pending in the Supreme Court ("You all know how poetic justice was done to... your previous chief minister," the Pune audience was told).

Tulzapurkar defends his speech as an exercise in introspection. Talking to INDIA TODAY, he said: "Public and professional

"Every judge, whether he believes it or not has a social philosophy. We acquire certain slants, attitudes, prejudices, frames of mind... I have never found difficulty in moulding the law to suit the needs of the people."



Bhagwati

opinion should exert (themselves). Otherwise, how do you control judges? If you arouse public opinion, it will go a long way." Reiterating his criticism of Bhagwati's "supervisory tendencies" in public interest litigation, he said: "We are not legislators. There are common law restrictions on us. How long can supervision go on? Should the Supreme Court run every institution in the country?"

IT WAS evident that Tulzapurkar's animus against Bhagwati was deep-rooted. Even in the famous *Habeas Corpus* judgment (*ADM Jabalpur vs. Shiv Kant Shukla*) of April 1976, where Bhagwati and Chandrachud had concurred with a majority judgment holding that detention under MISA could not be challenged in court, he felt, Bhagwati had tended towards the Government a little too much. "Now he has to retrieve ground," he said.

Recriminations: The major portion of

blame for this sad state of affairs, however, is laid at the chief justice's door. "Chandrachud is not trying to assert his authority," says one lawyer. "He should have called all his brother judges together and sorted out their differences internally. Tension has to be released, after all."

Advocate Gobinda Mukhoty says: "The judges are to blame for the crumbling system. While sitting, they must not make controversial statements in legal and constitutional matters or *sub judice* matters. That will only confuse the litigant public. And Article 141 of the Constitution says that the Supreme Court's pronouncements are the law of the land."

Mukhoty, a leading civil-rights activist himself, feels public interest litigation is doing a lot of good. "At the moment to be able to live, to exist—forget with dignity—is itself immensely difficult," he says. "Why should stifling procedures be stuck to always? Procedure is the handmaiden of justice and not the other way around."

"The war between the judges in the Judges' Transfer Case raised strong apprehensions that the Supreme Court is gripped by an instinct for suicide," says senior lawyer R.K. Garg, "and everything that has happened thereafter justifies these apprehensions. There is competition amongst the judges for a larger voice in executive decisions. The judges of the Supreme Court should prove themselves worthy of the trust reposed in them by 700 million people."

When asked to answer Tulzapurkar's charges, Bhagwati said: "I would not be provoked into committing the same impropriety, because I firmly believe that any unseemly controversy between judges affects the prestige and credibility of the judicial institution. This institution must be placed above the men who comprise it."

Acknowledged to be in possession of a keen intellect, and an incisive vision, Bhagwati is nevertheless thought by many lawyers to be gripped by high ambition, which makes him keenly aware of the prevailing political currents nor averse to swimming with such currents. One senior lawyer sums it up when he says: "Bhagwati does not have much jurisprudential sincerity. His is overt populism."

Social Conscience: But Bhagwati is extremely loquacious when it comes to public interest litigation and the rights of the poor. He says his eyes were opened to

the grinding poverty in India's countryside when he became chief justice of the Gujarat High Court and toured villages in his state. This concern impelled him to set up, with the Gujarat government's aid, a legal aid scheme—a philosophy he has expanded since he entered the Supreme Court in 1973, and now as chairman of the National Committee for the Implementation of Legal Aid.

"Every judgment is a work of art, an act of creation," he says, "and a judge ought to have an architectural view of the entire Constitution, treating every case as a brick to add to the edifice. Only now, after 32 years of the Republic, is the Supreme Court of India becoming the Supreme Court for Indians. It is being identified as the 'last resort for the oppressed and the bewildered', the only bulwark against executive excesses, legislative invasions, and governmental or managerial lawlessness."

Bhagwati admits that in his zeal to transform the Supreme Court into an ombudsman, he may sometimes have pushed the limits of judicial freedom too far. In much of his work, his inspiration has been Justice V.R. Krishna Iyer, who entered the Supreme Court on the same day with him nine years ago but retired in 1980.

He says that he has never taken on an executive role, pointing out that in the Bhagalpur blindings case he turned down the blinded undertrials' counsel's plea that the CBI report should be made public and that the Supreme Court ought to decide whether or not the police were responsible for the blindings so that compensation could be demanded. "My only desire," he says, "has been to ensure that the Government does not sleep over the disposal of the Bhagalpur prosecutions. Nor have I, in the Hyderabad bride-burning case, taken on the task of establishing guilt, but only tried to galvanise the police there into prompt investigation."

Justice Krishna Iyer also cannot see what the fuss is all about. Says he: "I'm shocked that even after Article 39 (A) any judge should oppose or belittle public interest litigation and people-oriented simplification of procedure. Access to justice is the first among human rights especially when it affects the weakest sector of society. Therefore, the niceties and formalities and the sophisticated technicalities which themselves operate to deny access to justice vis à vis the poor, the

illiterate and the backward must be relaxed. No iron curtain of rigid procedure can stand between public justice and the court."

Predilections: To the controversy over whether judges should be overtly politicised, Bhagwati says: "Every judge, whether he admits it or not, has a social philosophy. We acquire certain slants, attitudes, prejudices, frames of mind." Himself clearly left-of-centre in his ideology, Bhagwati participated in the 1942 Quit India movement with Achyut Patwardhan and Aruna Asaf Ali, and says: "I have never found difficulty in moulding the law to suit the needs of the people. In that respect I am an idealist."

Ultimately, however, Bhagwati admits: "We men of law cannot remove the people's poverty or give them food, shelter, clothing, education and health. Yet we



**The battle lines have
been drawn firmly now,
and the legal profession fears
that there will be more such hostile
and public confrontations
between the Supreme
Court's bickering
judges in the future.**

can expose the fallacy of a conflict between liberty and justice."

Many jurists and legal pundits privately feel, however, that Bhagwati's acceleration of public interest litigation and the other activist trends in the court may have been too fast, and could possibly prove counter-productive in the long run.

So sharp have divisions within the Bench become that certain judges refuse to even refer back to other judges' previous verdicts. The camps among the judges are highly discernible, with Desai, O. Chinappa Reddy and E.S. Venkatramiah firmly behind Bhagwati, and Baharul Islam, Mishra, Balakrishna Eradi and A.N. Sen also in his ideological camp. Tulzapurkar, on the other hand, is supported by A.P. Sen, Murtaza Fazal Ali, and Chief Justice Chandrachud to some extent, with Varadarajan sometimes coming on his side.

The only judge consistently held up as an example of a committed centrist in this

often acrimonious division is R.S. Pathak. Nevertheless, such schisms have even led to "Bench fixations", with Bhagwati very often sitting along with Pathak and A.N. Sen, and Tulzapurkar with A.P. Sen and Fazal Ali. Certain lawyers are acknowledged to try to get their cases heard by certain judges they find sympathetic, and so an element of predictability, too, has invaded the court.

Battle Lines: The Tulzapurkar-Bhagwati feud did have one very clear outcome. INDIA TODAY has learnt that around the time of Tulzapurkar's Pune speech, Chief Justice Chandrachud finally issued an order that was designed to defuse the tension. All letter-petitions addressed to "any judge" are now required to be sent on to the registrar of the court, with Chandrachud ultimately deciding on whether to take them up and to which Bench to assign each letter.

This is a major development, and may well slow down the pace of public interest litigation. It clips Bhagwati's wings to some extent, and represents a victory for Tulzapurkar, who in fact hinted at the step in his Pune speech.

But the battle lines have been drawn firmly now, and the legal profession fears that there will be more such hostile and public confrontations between the Supreme Court's bickering judges in the future. Such divisions are building up at a time when every concern-

ed citizen needs a strong and united Supreme Court, and when the tussle between the executive and the legislature on the one hand, and the judiciary on the other, is growing to critical proportions.

If the recent schisms in the court impede, or even discourage, public interest litigation, it will be a great loss to India's repressed people. And yet, Tulzapurkar has a point when he attacks sycophancy, the yearning for public adulation and limelight, and the tendency to overreach strictly judicial functioning.

The tragedy is that the Supreme Court is flying in the face of accepted principles of judicial conduct. A judge has to accept certain restrictions on his conduct. He must not enter into a public controversy. The judiciary is expected to be a lofty, dignified and learned body, above allurements and prejudices. By indulging in such mudslinging, the Supreme Court is only opening its flanks to attack from without.

—CHAITANYA KALBAG